No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
Petitioner,
v.
R. SCOTT APPLING,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 11, 2017
CERTIORARI GRANTED JANUARY 12, 2018

TABLE OF CONTENTS

Page

United States Court of Appeals for the Eleventh Circuit Relevant Docket Entries: *Appling v. Lamar, Archer & Cofrin, LLP*, No. 16-11911 ..... JA-1

United States District Court for the Middle District of Georgia Relevant Docket Entries: *Appling v. Lamar, Archer & Cofrin, LLP*, No. 3:15-cv-00031-CAR JA-3

United States Bankruptcy Court for the Middle District of Georgia Relevant Docket Entries: *In re Appling*, No. 13-30083 ..... JA-7

United States Bankruptcy Court for the Middle District of Georgia Relevant Docket Entries: *Lamar, Archer & Cofrin, LLP v. Appling*, Adversary No. 13-3042 ..... JA-13

Transcript of September 18, 2014 Trial Proceedings, *Lamar, Archer & Cofrin, LLP v. Appling*, No. 13-03042 (Bankr. M.D. Ga. Dec. 30, 2014), ECF No. 66 (excerpts) JA-31

Transcript of September 23, 2014 Trial Proceedings, *Lamar, Archer & Cofrin, LLP v. Appling*, No. 13-03042 (Bankr. M.D. Ga. Dec. 30, 2014), ECF No. 69 (excerpts) JA-111

ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (April 11, 2017)

Opinion of the United States Court of Appeals for the Eleventh Circuit, *Appling v. Lamar, Archer & Cofrin, LLP (In re Appling)*, 848 F.3d 953 (11th Cir. 2017) 1a

Order on Appeal of the United States District Court for the Middle District of Georgia, *R. Scott Appling v. Lamar, Archer & Cofrin, LLP*, No. 3:15-CV-031 (M.D. Ga. Mar. 28, 2016).....20a

Opinion of the United States Bankruptcy Court for the Middle District of Georgia, *Lamar, Archer & Cofrin, LLP v. Appling (In re Appling)*, 527 B.R. 545 (Bankr. M.D. Ga. Mar. 10, 2015) 45a

Opinion of the United States Bankruptcy Court for the Middle District of Georgia, *Lamar, Archer & Cofrin, LLP v. Appling (In re Appling)*, 500 B.R. 246 (Bankr. M.D. Ga. 2013) 67a

RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Eleventh Circuit
Case No. 16-11911

Date Filed	Docket Text
04/28/2016	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant R. Scott Appling on 04/22/2016. Fee Status: Fee Paid. No hearings to be transcribed. The appellants brief is due on or before 06/01/2016. The appendix is due no later than 7 days from the filing of the appellant's brief. Awaiting Appellant's CIP Due on or before 05/12/2016 as to Appellant R. Scott Appling
	* * *
06/15/2016	Appellant's brief filed by R. Scott Appling. (ECF: Paul Hughes)
	* * *
06/21/2016	Appendix filed [One VOLUMES] by Appellant R. Scott Appling. (ECF: Paul Hughes)
	* * *
08/02/2016	Corrected Appellee's Brief filed by Appellee Lamar, Archer & Cofrin, LLP. (ECF: David Davenport)
	* * *

09/01/2016	Reply Brief filed by Appellant R. Scott Appling. (ECF: Paul Hughes)
	* * *
12/15/2016	Oral argument held. Oral Argument participants were Paul Whitfield Hughes for Appellant R. Scott Appling and Robert C. Lamar for Appellee Lamar, Archer & Cofrin, LLP.
02/15/2017	Opinion issued by court as to Appellant R. Scott Appling. Decision: Reversed and Remanded. Opinion type: Published. Opinion method: Signed. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions.
02/15/2017	Judgment entered as to Appellant R. Scott Appling
03/16/2017	Mandate issued as to Appellant R. Scott Appling
04/11/2017	Notice of Writ of Certiorari filed as to Appellant R. Scott Appling. SC# 16-1215.
	* * *
01/16/2018	Writ of Certiorari filed as to Appellee Lamar, Archer & Cofrin, LLP is GRANTED. SC# 16-1215.--[Edited 01/18/2018 by JC]

RELEVANT DOCKET ENTRIES

U.S. District Court
for the Middle District of Georgia
Case No. 3:15-cv-00031-CAR

Date Filed	#	Docket Text
03/24/2015	1	Notice of APPEAL FROM BANKRUPTCY COURT filed by R. SCOTT APPLING (US BANKRUPTCY COURT,) (Main Document 1 replaced on 3/24/2015) (ggs). (Additional attachment(s) added on 3/24/2015: # 1 Docket Sheet, # 2 Orders being appealed) (ggs). (Entered: 03/24/2015)
		* * *
04/22/2015	3	Notice of BANKRUPTCY APPEAL RECORD filed Bankruptcy APPEAL RECORD including docket sheet and trial exhibits attached. **The Notice of Electronic Filing serves as certification for these appeal documents.** (US BANKRUPTCY COURT,) (Entered: 04/22/2015)
		* * *

04/23/2015	5	EXHIBIT(S) Additional Exhbits to the Appeal Record: Part 1 of Exhibits from the September 18 trial re 3 Bankruptcy Appeal (Attachments: # 1 Part 2 of Exhbits from the September 18 trial, # 2 Exhibits from the September 23 trial) (ggs) (Entered: 04/23/2015)
05/04/2015	6	Supplemental Record on Appeal transmitted re 1 Bankruptcy Appeal (US BANKRUPTCY COURT,) (Entered: 05/04/2015)
05/04/2015	7	Supplemental Record on Appeal transmitted re 1 Bankruptcy Appeal (US BANKRUPTCY COURT,) (Entered: 05/04/2015)
		* * *
05/27/2015	9	Appellant's BRIEF by R. SCOTT APPLING. (WILDER, DANIEL) (Entered: 05/27/2015)
		* * *
07/02/2015	11	Appellee's BRIEF by LAMAR, ARCHER & COFRIN, LLP. (DAVENPORT, DAVID) (Entered: 07/02/2015)
07/20/2015	12	Appellant's REPLY BRIEF by R. SCOTT APPLING (WILDER, DANIEL) (Entered: 07/20/2015)

03/28/2016	13	**ORDER** that the decision of the Bankruptcy Court be AFFIRMED. Ordered by US DISTRICT JUDGE C ASHLEY ROYAL on 3/28/16. (lap) (Entered: 03/28/2016)
03/29/2016	14	**JUDGMENT** affirming Bankruptcy Court's decision. (ggs) (Entered: 03/29/2016)
04/22/2016	15	NOTICE OF APPEAL as to 14 Judgment, 13 Order by R. SCOTT APPLING. Filing fee $ 505, Receipt No.: 113G-2310364. (WILDER, DANIEL) (Entered: 04/22/2016)
		* * *
04/25/2016	16	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: 14 Judgment, 13 Order, 15 Notice of Appeal Judge Appealed: C. Ashley Royal. Court Reporter: N/A. Fee Paid: PAID. (ggs) (Entered: 04/25/2016)
04/25/2016		Pursuant to F.R.A.P 11(c) the Clerk of the District Court for the Middle District of Georgia certifies that the record is complete for purposes of this appeal re: 15 Notice of Appeal. The entire record on appeal is available electronically (ggs) (Entered: 04/25/2016)

04/28/2016	17	USCA Case Number 16-11911-GG re 15 Notice of Appeal filed by R. SCOTT APPLING. (ggs) (Entered: 04/28/2016)
02/15/2017	18	USCA Order/Opinion Reversing and Remanding as to 15 Notice of Appeal filed by R. SCOTT APPLING (Attachments: # 1 Cover Letter)(ggs) (Entered: 02/15/2017)
03/06/2017	19	**ORDER** on Bankruptcy Appeal re 18 USCA Order. Ordered by US DISTRICT JUDGE C ASHLEY ROYAL on 3/6/17. (lap) (Entered: 03/06/2017)
03/16/2017	20	MANDATE of USCA reversing and remanding as to 15 Notice of Appeal filed by R. SCOTT APPLING (Attachments: # 1 Cover Letter)(ggs) (Entered: 03/16/2017)
03/16/2017	21	**JUDGMENT** remanding case (ggs) (Entered: 03/16/2017)

RELEVANT DOCKET ENTRIES

U.S. Bankruptcy Court
for the Middle District of Georgia
Case No. 13-30083

Date Filed	#	Docket Text
01/18/2013	1	Chapter 7 Voluntary Petition All schedules and statements have been filed. Fee Amount $306 filed by R. Scott Appling, Connie F. Appling (Entered: 01/18/2013)
01/18/2013		Receipt of Voluntary Petition (Chapter 7)(13-30083) [misc,volp7] (306.00) Filing Fee. Receipt number 9038998. Fee amount 306.00. (U.S. Treasury) (Entered: 01/18/2013)
01/18/2013	2	Social Security Number (B21) filed by Connie F. Appling, R. Scott Appling (Wilder, Daniel) (Entered: 01/18/2013)
		* * *
01/18/2013	5	Employee Income Records or Affidavit of No Income filed by Connie F. Appling, R. Scott Appling (Wilder, Daniel) (Entered: 01/18/2013)
		* * *

01/23/2013	8	Amended Petition; reason for amendment:to include the image of the matrix; filed by Connie F. Appling, R. Scott Appling (related document(s)1 Voluntary Petition (Chapter 7)) (Wilder, Daniel) (Entered: 01/23/2013)
		* * *
01/30/2013	11	Notice of Appointment of Successor Trustee. William Flatau added to the case. Ernest V. Harris removed from the case. filed by U.S. Trustee – MAC (Hardy, Elizabeth) (Entered: 01/30/2013)
		* * *
02/07/2013	15	Motion to Avoid Lien with Branch Banking & Trust Co. filed by Connie F. Appling, R. Scott Appling Objections due by 2/27/2013.Hearing scheduled for 03/27/2013 at 02:00 PM - Athens Courthouse. (Wilder, Daniel) (Entered: 02/07/2013)
02/07/2013	16	Motion to Avoid Lien with John Davis filed by Connie F. Appling, R. Scott Appling Objections due by 2/27/2013.Hearing scheduled for 03/27/2013 at 02:00 PM - Athens Courthouse. (Wilder, Daniel) (Entered: 02/07/2013)

02/07/2013	17	Motion to Avoid Lien with Lamar, Archer & Cofrin, LLP filed by Connie F. Appling, R. Scott Appling Objections due by 2/27/2013.Hearing scheduled for 03/27/2013 at 02:00 PM - Athens Courthouse. (Wilder, Daniel) (Entered: 02/07/2013)
03/01/2013	18	Order Granting Motion To Avoid Lien with Lamar, Archer & Cofrin, LLP (Related Doc # 17) Signed on 3/1/2013. (Huellemeier, M.) (Entered: 03/04/2013)
03/01/2013	19	Order Granting Motion To Avoid Lien with John Davis (Related Doc # 16) Signed on 3/1/2013. (Huellemeier, M.) (Entered: 03/04/2013)
		* * *
03/11/2013	24	Motion to Avoid Lien with Branch Banking & Trust *Amended* filed by Connie F. Appling, R. Scott Appling Objections due by 4/1/2013.Hearing scheduled for 04/24/2013 at 02:00 PM - Athens Courthouse. (Wilder, Daniel) (Entered: 03/11/2013)

03/12/2013	25	Notice of Withdrawal filed by Connie F. Appling, R. Scott Appling (related document(s)15 Motion to Avoid Lien) (Wilder, Daniel) Modified on 3/18/2013 (Martin, D.). Amended by document 26. (Entered: 03/12/2013)
03/15/2013	26	Amended Document Corrent caption to include creditor name filed by Connie F. Appling, R. Scott Appling (related document(s)15 Motion to Avoid Lien, 25 Notice of Withdrawal) (Wilder, Daniel) (Entered: 03/15/2013)
04/02/2013	27	Order Granting Motion To Avoid Lien with Branch Banking & Trust Co. (Related Doc # 24) Signed on 4/2/2013. (Stratigos, C) (Entered: 04/02/2013)
		* * *
04/23/2013	29	Adversary case 13-03042. (65 (Dischargeability - other)) Complaint by Lamar, Archer & Cofrin, LLP against R. Scott Appling . Receipt Number fnp, Fee Amount $293 (Clowers, V.) (Entered: 04/23/2013)

04/23/2013	30	Financial Management Course Certificate filed by Connie F. Appling, R. Scott Appling (related document(s)12 Meeting of Creditors Chapter 7 No Asset) (Wilder, Daniel) (Entered: 04/23/2013)
04/30/2013		Chapter 7 Trustee's Report of No Distribution: I, William Flatau, having been appointed trustee of the estate of the above-named debtor(s), report that I have neither received any property nor paid any money on account of this estate; that I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate; and that there is no property available for distribution from the estate over and above that exempted by law. Pursuant to Fed R Bank P 5009, I hereby certify that the estate of the above-named debtor(s) has been fully administered. I request that I be discharged from any further duties as trustee. Key information about this case as reported in schedules filed by the debtor(s) or otherwise found in the case record: This case was pending for 3 months. Assets Abandoned (without deducting any secured claims): $ 0.00,

		Assets Exempt: $ 551900.00, Claims Scheduled: $ 1443514.99, Claims Asserted: Not Applicable, Claims scheduled to be discharged without payment (without deducting the value of collateral or debts excepted from discharge): $ 1443514.99. (Flatau, William) Modified on 1/29/2015 (Thiel, J.). (Entered: 04/30/2013)
05/14/2013	31	Order Discharging Both Debtors . Signed on 5/14/2013 (Miller, M.) (Entered: 05/14/2013)
		* * *
10/24/2014	33	FINAL DECREE. The estate of the above-named debtor(s) has been fully administered. IT IS ORDERED THAT: the current and any former case or interim trustee is discharged as trustee of the above-named debtor and the bond is cancelled; the case of the above-named debtor(s) is closed. THIS IS A TEXT ONLY ORDER. Signed on 10/24/2014. (Auto7) (Entered: 10/24/2014)
10/27/2014	34	Order Reopening Case . Signed on 10/27/2014 (Thiel, J.) (Entered: 10/28/2014)
		* * *

RELEVANT DOCKET ENTRIES

U.S. Bankruptcy Court
for the Middle District of Georgia
Case No. 13-03042

Date Filed	#	Docket Text
04/23/2013	1	Adversary case 13-03042. (65 (Dischargeability - other)) Complaint by Lamar, Archer & Cofrin, LLP against R. Scott Appling . Receipt Number fnp, Fee Amount $293 (Clowers, V.) (Entered: 04/23/2013)
		* * *
04/26/2013	2	Amended Complaint *CM/ECF Electronic Filing of Complaint* by Bruce B. Weddell on behalf of Lamar, Archer & Cofrin, LLP against R. Scott Appling. (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP) (Weddell, Bruce) (Entered: 04/26/2013)

04/26/2013	3	Amended Complaint *Amended CM/ECF Electronic Filing of Complaint* by Bruce B. Weddell on behalf of Lamar, Archer & Cofrin, LLP against R. Scott Appling. (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP) (Weddell, Bruce) (Entered: 04/26/2013)
		* * *
04/29/2013		Adversary case 13-03042. (65 (Dischargeability - other)) Complaint by Lamar, Archer & Cofrin, LLP against R. Scott Appling . Receipt Number fnp, Fee Amount $293 (Clowers, V.) (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Pre-Trial Conference set for 7/2/2013 at 01:30 PM at Athens Courthouse. (Stratigos, C) (Entered: 04/29/2013)
		* * *
05/28/2013	7	Motion to Dismiss Adversary Proceeding filed by Defendant R. Scott Appling (Wilder, Daniel) (Entered: 05/28/2013)

05/28/2013	8	Answer to Complaint filed by Defendant R. Scott Appling (Wilder, Daniel) (Entered: 05/28/2013)
		* * *
06/11/2013	9	Amended Complaint by Robert C. Lamar on behalf of Lamar, Archer & Cofrin, LLP against R. Scott Appling. (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP) (Lamar, Robert) (Entered: 06/11/2013)
06/11/2013	10	Response with opposition to Motion to Dismiss filed by Plaintiff Lamar, Archer & Cofrin, LLP (related document(s)7 Motion to Dismiss Adversary Proceeding) (Lamar, Robert) (Entered: 06/11/2013)
		* * *
06/17/2013	11	Motion to Amend Complaint (Related document(s) 9 Amended Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP. (Entered: 06/17/2013)
		* * *

06/24/2013	13	Response with opposition *Reply to Plaintiff's Response (Dkt. 10) to Motion to Dismiss* filed by Defendant R. Scott Appling (related document(s)7 Motion to Dismiss Adversary Proceeding) (Wilder, Daniel) (Entered: 06/24/2013)
06/24/2013	14	Response with opposition filed by Defendant R. Scott Appling (related document(s)11 Motion to Amend Complaint) (Wilder, Daniel) (Entered: 06/24/2013)
06/24/2013	15	Answer to Complaint *(Answer to Amended Complaint)* filed by Defendant R. Scott Appling (Wilder, Daniel) (Entered: 06/24/2013)

* * *

07/02/2013		Hearing Held (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP, Hearing Set on Complaint, 7 Motion to Dismiss Adversary Proceeding filed by Defendant R. Scott Appling, 10 Response With Opposition filed by Plaintiff Lamar, Archer & Cofrin, LLP, 11 Motion to Amend Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP, 13 Response With Opposition filed by Defendant R. Scott Appling, 14 Response With Opposition filed by Defendant R. Scott Appling). Order/Withdrawal Follow-up Due: 7/23/2013. (NeSmith, Fran)JUDGE TO DECIDE. (Entered: 07/05/2013)
07/10/2013	16	Opposing Brief filed by Plaintiff Lamar, Archer & Cofrin, LLP (related document(s)7 Motion to Dismiss Adversary Proceeding) (Weddell, Bruce) (Entered: 07/10/2013)
09/19/2013	17	Order Granting Motion To Amend Complaint(RE: Related Doc # 11) amending (related documents:9 Amended Complaint). Signed on 9/19/2013. (Hooper, D.) (Entered: 09/20/2013)

09/19/2013	18	Memorandum Opinion (related document(s)7 Motion to Dismiss Adversary Proceeding. Signed on 9/19/2013 (Hooper, D.) (Entered: 09/20/2013)
09/19/2013	19	Order Denying Motion to Dismiss Adversary Proceeding (Related Doc # 7) Signed on 9/19/2013. (Hooper, D.) (Entered: 09/20/2013)
		* * *
10/07/2013		Hearing Held (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP, 20 Scheduling Order). Order/Withdrawal Follow-up Due: 10/28/2013. (NeSmith, Fran)90 DAYS TO COMPLETE DISCOVERY, SCHEDULE STATUS CONF. (Entered: 10/07/2013)
		* * *
11/21/2013	27	Motion to Quash filed by Defendant R. Scott Appling Hearing scheduled for 12/18/2013 at 01:30 PM at Athens Courthouse (Wilder, Daniel) (Entered: 11/21/2013)

11/21/2013	28	Response with opposition filed by Defendant R. Scott Appling (related document(s)24 Certificate of Service) (Wilder, Daniel) (Entered: 11/21/2013)
		* * *
12/10/2013	30	Response with opposition *to Defendant's Objections to Notice of Deposition* filed by Plaintiff Lamar, Archer & Cofrin, LLP (related document(s)28 Response With Opposition) (Lamar, Robert) (Entered: 12/10/2013)
		* * *
01/21/2014	44	Notice of Withdrawal filed by Defendant R. Scott Appling (related document(s)27 Motion to Quash) (Wilder, Daniel) (Entered: 01/21/2014)
01/21/2014	45	Notice of Withdrawal filed by Defendant R. Scott Appling (related document(s)28 Response With Opposition) (Wilder, Daniel) (Entered: 01/21/2014)

01/22/2014	Adversary case 13-03042. (65 (Dischargeability - other)) Complaint by Lamar, Archer & Cofrin, LLP against R. Scott Appling . Receipt Number fnp, Fee Amount $293 (Clowers, V.) (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Status hearing to be held on 3/10/2014 at 02:30 PM at Macon Courtroom A. (Hooper, D.) *Status conference will be held in Macon via conference call. (Entered: 01/22/2014)*
	* * *
03/10/2014	Hearing Held (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP, 42 Order on Motion to Extend or Shorten Time, Hearing Set on Complaint). Order/Withdrawal Follow-up Due: 3/31/2014. (NeSmith, Fran)90 DAYS, SCHEDULE STATUS HEARING. WILL BE HELD BY PHONE CONFERENCE IN MACON. (Entered: 03/10/2014)
	* * *

	50	Motion to Compel Defendant's to Deposition filed by Plaintiff Lamar, Archer & Cofrin, LLP (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3) (Lamar, Robert) (Entered: 04/14/2014)
		* * *
04/28/2014	53	Response with opposition filed by Defendant R. Scott Appling (related document(s)50 Motion to Compel) (Wilder, Daniel) (Entered: 04/28/2014)
		* * *
04/30/2014		Hearing Held and Continued to Final Disposition Calendar. Reason: CONSENT ORDER TO BE FILED. (related document(s)50 Motion to Compel filed by Plaintiff Lamar, Archer & Cofrin, LLP, 53 Response With Opposition filed by Defendant R. Scott Appling). Final Disposition Hearing scheduled for 6/10/2014 at 02:30 PM at Athens Courthouse (NeSmith, Fran) (Entered: 05/01/2014)
		* * *

06/16/2014		Hearing Held (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP, 46 Scheduling Order). Order/Withdrawal Follow-up Due: 7/7/2014. (NeSmith, Fran)SCHEDULE TRIAL FOR 1 DAY IN AUGUST OR SEPTEMBER. (Entered: 06/16/2014)
		* * *
09/18/2014	61	PDF with attached Audio File. Court Date & Time [9/18/2014 9:37:49 AM]. File Size [54360 KB]. Run Time [03:46:30]. (CourtSpeak). (Entered: 09/18/2014)
09/18/2014		Hearing Continued (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Hearing scheduled for 9/23/2014 at 01:30 PM at Macon Courtroom A (NeSmith, Fran) REMAINDER OF TRIAL WILL BE HEARD IN MACON. (Entered: 09/19/2014)
09/23/2014	62	PDF with attached Audio File. Court Date & Time [9/23/2014 1:36:03 PM]. File Size [40529 KB]. Run Time [02:48:52]. (CourtSpeak). (Entered: 09/23/2014)

09/23/2014		Hearing Held (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Order/Withdrawal Follow-up Due: 10/14/2014. (NeSmith, Fran)20 DAYS TO BRIEF JUDGE WILL DECIDE. (Entered: 09/25/2014)
10/13/2014	63	Supporting Brief filed by Defendant R. Scott Appling (related document(s) Hearing Held) (Wilder, Daniel) (Entered: 10/13/2014)
10/14/2014	64	Letter by David W. Davenport to Judge James P. Smith. (Spilman, C) (Entered: 10/14/2014)
10/14/2014	65	Letter by Judge James P. Smith to David Davenport and Daniel Wilder. (Spilman, C) (Entered: 10/14/2014)
11/21/2014		Transcript Request from David Davenport of Lamar Archer for hearings held on 9/18/14 & 9/23/14. Payment has been made to the transcription agency, Information transmitted to the transcriptionist on 11/21/2014. (Thomas, R.) (Entered: 11/21/2014)

12/22/2014	66	Transcript of Hearing held on 9/18/2014. (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Redacted Transcript Due 1/22/2015. TRANSCRIPT IS RESTRICTED UNTIL 3/23/2015. (Thomas, R.) (Entered: 12/30/2014)
12/22/2014	67	Notice of Official Filing of Transcript of Hearing Held on 9/18/.2014 (related document(s)66 Transcript of Hearing). (Thomas, R.) (Entered: 12/30/2014)
12/22/2014	68	Amended Notice of Official Filing of Transcript of Hearing Held on 9/18/2014 (related document(s)66 Transcript of Hearing). (Thomas, R.) Amended to correct adversary number listed in notice. (Entered: 12/30/2014)
12/22/2014	70	Notice of Official Filing of Transcript of Hearing Held on 9/23/2014 (related document(s)66 Transcript of Hearing). (Thomas, R.). Related document(s) 69 Transcript of Hearing. (Entered: 12/30/2014)

12/22/2014	69	Transcript of Hearing held on 9/23/2014. (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Redacted Transcript Due 1/30/2015. TRANSCRIPT IS RESTRICTED UNTIL 3/30/2015. (Thomas, R.) (Entered: 12/30/2014)
		* * *
01/09/2015	74	Letter to Honorable James P. Smith Re: filed by Plaintiff Lamar, Archer & Cofrin, LLP (Lamar, Robert) (Entered: 01/09/2015)
01/12/2015	75	Letter by Judge James P. Smith to David Davenport and Daniel Wilder. (Spilman, C) (Entered: 01/12/2015)
01/21/2015	76	Letter to Honorable James P. Smith Re: filed by Plaintiff Lamar, Archer & Cofrin, LLP (Lamar, Robert)*See document 77 for correct event* Modified on 1/22/2015 (Thiel, J.). (Entered: 01/21/2015)

01/21/2015	77	Trial Brief filed by David W. Davenport on behalf of Plaintiff Lamar, Archer & Cofrin, LLP (related document(s)1 Complaint) *Re-docketed document 76 to correct event* (Thiel, J.) (Entered: 01/22/2015)
03/10/2015	78	Memorandum Opinion (related document(s)1 Complaint. Signed on 3/10/2015 (Martin, D.) (Entered: 03/10/2015)
03/10/2015	79	Order granting (related document(s)1 Complaint. Court to followup on Final Report or closing:3/24/2015. Signed on 3/10/2015 (Martin, D.) (Entered: 03/10/2015)
		* * *
03/23/2015	82	Notice of Appeal. . Fee Amount $298 filed by Defendant R. Scott Appling (related document(s)78 Memorandum Opinion, 79 Order on Complaint) Appellant Designation due by 04/6/2015. (Wilder, Daniel) (Entered: 03/23/2015)
		* * *

03/24/2015	83	Transmittal of Initial Notice of Appeal to District Court (related document (s)82 Notice of Appeal filed by Defendant R. Scott Appling). (Clough, Diana) (Entered: 03/24/2015)
		* * *
04/06/2015	87	Appellant Designation of Contents For Inclusion in Record On Appeal *and Statement of Issues* filed by Defendant R. Scott Appling (related document(s)82 Notice of Appeal) Appellee designation due by 04/20/2015. Transmission Due by 05/6/2015. (Wilder, Daniel) (Entered: 04/06/2015)
04/20/2015	88	Letter to Honorable James P. Smith Re: filed by Plaintiff Lamar, Archer & Cofrin, LLP (Davenport, David) **re-docketed entry - see 89 Appellee designation of record on Appeal** (Entered: 04/20/2015)
04/21/2015	89	Appellee Designation of Contents for Inclusion in Record on Appeal filed by Plaintiff Lamar, Archer & Cofrin, LLP (in letter form) (related document(s)82 Notice of Appeal) (Kennell, E.) (Entered: 04/21/2015)

04/22/2015	90	Transmittal of Complete Record on Appeal to District Court (related document(s)82 Notice of Appeal filed by Defendant R. Scott Appling). (Taylor-Owens, M.) (Entered: 04/22/2015)
04/23/2015	91	Addendum to Record on Appeal to include Exhibits emailed to Amy Stapleton at District Court. (related document(s)82 Notice of Appeal) (Taylor-Owens, M.) (Entered: 04/23/2015)
05/04/2015	92	Transmittal of Addendum to Appeal to include Exhibits 5 and 6. (related document(s)82 Notice of Appeal) (Taylor-Owens, M.) (Entered: 05/04/2015)
03/29/2016	93	Final Order By District Court. Ruling of District Court: The Court agrees with the decision of the Bankruptcy Court. Accordingly, it is HEREBY ORDERED that the decision of the Bankruptcy Court be AFFIRMED. (related document(s)79, 78 Memorandum Opinion, Order on Complaint. Appeal follow-up due by 4/28/2016. Signed on 3/28/2016 (Entered: 03/29/2016)

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02/15/2017	95	Order from 11th Circuit Court of Appeals Re: Appeal BK Case Number 13-3042-JPS and District Ct Case Number 15-00031-CAR and 11th Circuit Case Number 16-11911 Reversing and Remanding . Signed on 2/15/2017 (Clough, Diana) (Entered: 02/16/2017)
03/06/2017	96	Order By District Court on Bankruptcy Appeal. Pursuant to the decision of the 11th Circuit, this Court's Order entered on March 28, 2016 is reversed, and the case is remanded to the Bankruptcy Court for further proceedings consistent with said decision. Follow-up due by 4/5/2017. Signed on 3/6/2017 (Clough, Diana) (Entered: 03/07/2017)
04/04/2017	97	Joint Motion To Stay (related documents 96 Order District Court re: Appeal) filed by Plaintiff Lamar, Archer & Cofrin, LLP and Defendant R. Scott Appling (Lamar, Robert) Modified on 4/6/2017 (Harris, D.). *See amended document 99. (Entered: 04/04/2017)*

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04/05/2017	99	Joint Amended Document - Amended to correct some text within the original motion filed by Defendant R. Scott Appling , Plaintiff Lamar, Archer & Cofrin, LLP (related document(s)97 Motion To Stay) (Harris, D.) (Entered: 04/06/2017)
04/17/2017	100	Consent Order Granting Motion To Stay (Related Doc # 97) Signed on 4/17/2017. (Harris, D.) (Entered: 04/18/2017)

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA

LAMAR, ARCHER & COFRIN, LLP, Plaintiff, vs. R. SCOTT APPLING, Defendant.	CASE NO: 13-03042 ADVERSARY Athens, Georgia Thursday, September 18, 2014 (9:37 a.m. to 12:22 p.m.) (1:31 p.m. to 2:48 p.m.)

MAIN CASE: 13-30083
R. SCOTT APPLING AND CONNIE F. APPLING

TRIAL PROCEEDINGS

BEFORE THE HONORABLE JAMES P. SMITH,
UNITED STATES BANKRUPTCY JUDGE

* * *

[13]

* * *

DIRECT EXAMINATION

BY MR. DAVENPORT:

Q Mr. Gordon, would you state your name and occupation, residence for the Court.

A My name is --

THE COURT: Let's don't put his residence in. There's a hesitancy in federal court now to give residence address unless there's some kind of relevance to the case, so --

A My name is Walter James Gordon, Senior. I'm an attorney in Hartwell, Georgia.

Q Do you have your own law firm in Hartwell, Georgia?

A I do.

Q Are you also involved with the -- representing the City in Hartwell?

A Hart County.

Q Or the county. And what's your --

A Yes, I'm the county attorney for Hart County.

Q Okay. Now, you're familiar with the underlying cases involved in this bankruptcy --

A I am. **[14]**

Q Okay. And you know Mr. Appling?

A I do.

Q Can you tell the Court -- first of all, you were co-counsel in the underlying suit of *Scott Appling and Hartwell Enterprises versus John Davis, Herrington, Seeding, Norga*, and the other Defendants?

A Yes.

Q Okay. How did you come to be co-counsel in that case?

A Mr. Appling had consulted with me. He had come to me after he had engaged in a -- the purchase of a business, Herrington Seating, and another smaller business. And he was concerned that he had overpaid for the business or that certain things were not as he believed them to be and wanted to talk about basically rescinding, or coming out of, the

arrangement that he had entered into. When I talked with him, I explained to him that I just didn't have the -- you know, I have -- at that time I had one associate and several clerks but practiced by myself, and at the time I didn't feel that I had the time or the depth in my practice to do what needed to be done. It was a several million dollar deal and he had a significant payment that was looming -- I think it was coming up within the next month -- and I knew that I would not be able to devote the time or effort that a case like that would need. It was just too complex for me. So I had referred him to Mr. Lamar. I later learned that he had hired Mr. Lamar, and Mr. Lamar talked to me **[15]** about assisting in a local counsel or co-counsel position, which I was happy to do.

Q Okay. And when -- what -- when was that? Was that in July of 2004? Just to keep this moving.

A As best I remember. It was -- it could have been June. It was June or July of 2004.

Q And did Mr. Appling, on his own behalf and his company's behalf, in fact hire you as local counsel, co-counsel?

A Yes.

Q In addition to Lamar, Archer, And Cofrin?

A Yes.

Q And did you in fact perform and do work on their -- the 13 Defendant's case --

A I did.

Q Okay. And were you aware as the case progressed during the time range in March that

Lamar, Archer, and Cofrin had sent a letter to Mr. Appling regarding his past due fees?

A Yes, I believe I was copied on that letter.

Q Okay. And at that time, were you owed fees also?

A Yes.

Q How much were the fees that you were owed?

A In March of 2005, Mr. Appling had made a payment to me, perhaps two, but at that time in March of '05, my time records showed that I was owed approximately 17 or $18,000.

Q Okay. And in the letter that Mr. Lamar sent on behalf of **[16]** Lamar, Archer, And Cofrin, are you aware that he threatened to have the firm withdrawn unless payment --

A Oh, yes. If I recollect that letter, Lamar, Archer, And Cofrin was owed close to 70 or maybe even $75,000 at the time. There had not been a payment made for some period of several months. And Mr. Lamar was concerned that he might not be paid and did in fact inform Mr. Appling that he would be compelled to withdraw if arrangements weren't made for payment.

Q Okay. Was there a meeting regarding the unpaid fees that occurred in your office shortly after that letter?

A Yes. We met in my conference room in my office in Hartwell. We met with -- Mr. Lamar and I met with Mr. Appling.

Q Okay. And can you tell the Court briefly what was discussed about the fees at the meeting and what Mr. Appling stated?

A We talked about a number of things. But just confining it to the discussion of fees that were owed, what I recall is that Mr. Appling had explained that he was in a -- you know, that he was having cash flow difficulties, that he was having to pour a great deal of money into the business. And as I had remembered, we had obtained an injunction that had basically deferred payments of $21,000 a month that he would have had to make in addition to a lump sum payment of I believe it was a hundred thousand that he would have had to make back in either July or early August of '04. But he had a great faith in his [17] business even then. But he told us that he had a tax refund that would be coming, that he had talked with an accountant who had explained to him a method by which he could amend apparently some older tax return, or previous tax return, and receive a substantial refund. And Mr. Appling said that that's how he would pay both Mr. Lamar and me if we would continue.

Q Did he mention a specific amount that he promised that that refund would be and that he would pay out of?

A He told us that he felt like it would be approximately a hundred thousand dollars. I'd asked him if he had the return. I don't think it had been prepared at that point.

Q Did you -- did he promise to pay Lamar, Archer, And Cofrin out of that refund?

A Yes.

Q Okay. Did, to your knowledge, Lamar, Archer, And Cofrin and your firm continue then to represent Mr. Appling?

A We did.

Q Okay. And are you aware of -- were there -- and subsequent to that, were you aware of a meeting in November of that same year, 2005, between Lamar, Archer, And Cofrin and Mr. Appling?

A Yes. I believe that Mr. Appling wanted to talk with Mr. Lamar about a number of things regarding the case and the fees. I did not go to that meeting. Atlanta basically -- the offices of Lamar, Archer, And Cofrin is about two hours from [18] Hartwell. That would have been four hours of travel time and I did not feel it necessary to go to that meeting myself.

Q Now, between the March meeting in your office and the November meeting at Lamar, Archer, And Cofrin's office, did Mr. Appling ever tell you or to your knowledge Lamar, Archer, And Cofrin that he had in fact received the tax refund?

A No.

Q Did he ever tell you that the amount was different than the hundred thousand dollars that he had represented to you at the March meeting?

A No.

Q Did he ever tell you that he had spent any of that tax refund?

A Oh, no.

Q Okay. Did you continue representing him subsequent to that November meeting --

A I did. We --

Q And Lamar, Archer, And Cofrin also?

A Yes. In fact, we were very close to getting this case settled even at that November meeting. There was still some hanging matters but we were close to getting it resolved. We -- both firms continued to work on his behalf; and if I recollect correctly, we had reached a settlement in principle the following January. And then I believe it was March when we finally were able to get everybody's name on the settlement [19] document and have it filed with the Court. I know that my fees at that time -- you know, by the time the case had been fully resolved, my fees were in the neighborhood of 26,000. And I don't know exactly what the Lamar, Archer fees were, but I'm sure that they were considerably more than they had been, you know, when we had been told about this tax refund.

Q Now --

A But we did continue to work on the case based on that promise that Mr. Appling had made that he would dedicate that tax refund to payment of attorneys' fees.

Q And was it your understanding throughout that time period from March of 2005 until March of 2006, when the case settled, that both your firm and Lamar, Archer, And Cofrin would be paid out of the tax return?

A Yes.

Q And even up to the date when the case was finally settled and dismissed, had Mr. Appling

advised you or to your knowledge Lamar, Archer, And Cofrin that he had received the tax refund?

A No. If I remember that right, Mr. Davenport, there was something about -- there was some delay in filing it because I was a little bit interested in that naturally. You know, I have a small firm and the loss of $26,000 is not something that I can easily stand. Nevertheless, we were so close to the end of the case at that point it made sense to me for us to continue to work with the promise of payment, even if the **[20]** payment had not been made in full -- even if he hadn't been able to make it in full. You know, it seemed to me that given what we did -- you know, if I remember this right, we actually retroactively cut a million and a half dollars off the purchase price, which he had agreed to with counsel. Not me or you, but with advice of counsel he had entered into this transaction. And we were able to get the price stripped by a million and a half dollars, as well as the cash flow issue. And we got -- we had a -- we got a temporary injunction that prohibited -- or caused him not to have to pay $21,000 a month on one loan and then a lump sum of a hundred thousand dollars on another loan that was in -- that involved some business broker that he was -- had a relationship with. And, you know, that was a -- in my mind a significant win. Mr. Appling didn't see it that way.

Q Do you remember when you first learned that he had in fact received this tax refund?

A I believe that it was sometime in May or June of '06. You know, we had completed the work, everything had basically been done at that time. I was feeling rather insecure concerning being paid but I had that faith that he would do as he told us he

would do and that he would pay us the tax refund. I later learned that he had received it, you know, after several times of telling me that he was waiting, that it was, you know, that -- I think that he even told me that the accountant had messed it up and that he had to go back and have it done again, or [21] maybe he went back another year. But I know he was most unhappy with the accountant who had told him he could receive a refund and who advised him to seek it, very unhappy with him because he had to do it again.

THE COURT: Let me --

A In any event --

THE COURT: -- stop you, excuse me --

THE WITNESS: Excuse me.

THE COURT: -- Mr. Gordon. Mr. Davenport, a young lady just walked in the back of the room. I don't know if she's a witness or if she needs to be excluded or --

MR. DAVENPORT: She's not a witness.

THE COURT: Okay, go ahead. Excuse me, Mr. Gordon.

THE WITNESS: Thank you, Judge.

BY MR. DAVENPORT:

A So I didn't know, you know, when or if this tax refund was coming but I know I was interested in it as certainly Mr. Lamar was. And it was some time in I think May or June of '06 that I learned that Mr. Appling had in fact received it, that he had in fact spent it, and that we -- neither you -- neither me nor your firm had been paid.

Q Did Mr. Appling ever call you and tell you personally that he had received the tax refund?

A No.

Q Did he ever call you and say, I'm not going to pay you out **[22]** of the tax refund?

A Mr. Davenport, we may have had a conversation sometime in June. I really don't remember.

THE COURT: June of what year, Mr. Gordon?

THE WITNESS: That would have been '06.

BY MR. DAVENPORT:

Q And that would have been after the case had been settled and --

A That's right.

Q -- resolved and dismissed.

A That's right.

Q Okay. And do you --

A I just remember being very disappointed when I learned that he had received the tax refund and had not used it in the way that he had promised us that he would.

Q And were you in, if not daily, constant communication with either myself or other lawyers at Lamar, Archer, And Cofrin regarding the case and sometimes the unpaid fees?

A Yes.

Q Were you ever --

A Well, frequent I would say. Maybe -- perhaps not constant, but frequent communication.

Q Were you ever advised by anyone at Lamar, Archer, And Cofrin prior to the resolution of the lawsuit that Mr. Appling had in fact received the tax refund first of all? **[23]**

A No.

Q Were you ever advised by anyone at Lamar, Archer, And Cofrin prior to the resolution of the lawsuit in March of 2006 that he had advised Lamar, Archer, And Cofrin that he wasn't going to pay Lamar, Archer, And Cofrin --

A No.

Q -- out of that lawsuit?

A Oh, no. In fact, had he -- had I been advised of that, I don't think I would have continued in the case.

Q Well, I was going to ask you what would you -- had he so advised you prior to the resolution of the case, what would you have done on behalf of your law firm?

A I would have withdrawn.

Q Okay. And you're aware that Lamar, Archer, And Cofrin had already threatened to do that a year earlier, in March of 2005, for non-payment of fees, correct?

Q Yes.

MR. DAVENPORT: Okay, no further questions.

* * *

[29]

* * *

BY MR. WILDER:

Q So let's ask in the order I was going to do. Now, did you have any past work with Mr. Lamar where he had referred you cases as an attorney or you'd worked as co-counsel?

A I have known Mr. Lamar for quite some time. We actually had attended Emory together. I had kept up with Mr. Lamar from time to time. I actually did a real estate transaction for [30] Mr. Lamar when he bought a house up in Hart County. I don't remember being co-counsel with Mr. Lamar on any matter. You know, I certainly have talked to him about a few things, but I don't think we'd actually been co-counsel in a case at that point.

Q Okay. Have you been since, or is this basically a one-shot deal that you were this involved in a case?

A Since that time, we have collaborated on a rather large case in the federal court in the Northern District.

Q You still have an ongoing business relationship with him, would it be fair to say that?

A We don't have any current cases together.

Q Okay, now, throughout the case, you were -- you've already said part of this. You were generally aware of Mr. Appling's business and its financial difficulties; is that an accurate statement?

A Well, I was aware of what Mr. Appling talked to me about, yes.

Q But it said you -- that your billing records show review of financials of this business on several occasions. Would that be accurate, you'd looked at the financials of this business?

A Well, most of that would have been the financials of the prior owner because that was one of the big concerns that we all had. **[31]**

Q I'll cite to you on September 21st, 2004, you logged in a half an hour for review client's bank statements.

A Okay.

Q And there are several other notations, "Review Appling bank records" on October 4th, 2004.

A Okay.

Q So you were generally familiar with Mr. Appling's financial wherewithal at this point?

A I was familiar with what he brought to me.

Q Okay. Do you know a Mike Strickland? That name ring a bell?

A I believe that that was an accountant that Mr. Appling had employed early in this case. We actually -- I believe there was a deposition of Mr. Strickland and it became fairly clear after that deposition that Mr. Strickland was not the man to handle this case.

Q On October the 15th, 2004, your records show that you reviewed Mr. Strickland's financial report.

A Okay.

Q That -- and do you remember what his report generally said. Business wasn't doing well.

A I have not reviewed any of these documents, sir, since the time that, you know, since whatever time that I showed on my time record.

Q Okay. Do you know a Mr. Porter? [32]

A I do. Mr. William Porter?

Q What does he do?

A Mr. William Porter is a business evaluation expert and --

Q He was hired in this case, in the --

A Pardon me?

Q He was hired in the case; is that right?

A He was higher in the case?

Q He was hired by --

A Yes.

Q -- Mr. Appling through --

A Yes.

Q -- Mr. Lamar?

A Yes.

Q Okay. And he gave a business valuation of the case.

A Yes. We hired him because of -- Mr. Strickland wasn't able to do what we really needed to do.

Q Okay. And do you remember the substance of Mr. Porter's report?

A I don't remember it in any detail.

Q Okay. If I made the characterization that his report says that the business was worth

substantially less than the 2.3 million offered for it, would that sound -- does that refresh your recollection of it?

A Oh, yeah. I mean, that -- you know, we hired him to show tha' - **[33]**

Q Okay.

A -- or to try to come up with a true and accurate value of the business that Mr. Appling had agreed to pay for.

Q So the point of the suit was to show that the business was worth nowhere near what he paid for it.

A Yes.

Q And with that you got -- you had access to financial information both for the business and Mr. Appling the whole time.

A I had access to whatever was relevant to the case, yes.

Q Okay. Now, March, 2005 you mentioned a meeting in your office. You recollect that Mr. Lamar's firm was owed 75,000.

A May not have been that much. It was something close to that. It may have been 65,000.

Q Okay. If I tell you 60,000, does that sound close enough ballpark?

A Sixty thousand?

Q Does that sound close enough to ballpark for you?

A It could have been. I really don't know. I know it was a substantial amount. It was more than what

was owed to me but they had done a lot more work than I had done.

Q Okay. Did you take any notes about that meeting?

A I may have.

Q Okay. Do you have any notes here about that meeting?

A No, I do not. **[34]**

Q Okay. Your billing record, I will tell you, on that day just says "meeting with Lamar and Mr. Appling" --

A Yes.

Q -- two hours.

A Yes.

Q Okay. So you have no detailed notes of that --

A I didn't say that, sir. I said that I did not bring any notes with me.

Q Okay. Did you send any letter to Mr. Appling after that meeting reflecting the agreement that you say was made?

A I don't recall. If I did, it's in my time record which you are apparently looking at.

Q Okay. Now, you said that you did not think the tax return was prepared by the time of that hearing -- or by the time of that March meeting.

A That March meeting? I don't think so.

Q So then Mr. Appling really didn't know how much he was getting back.

A No. he told us he was getting a hundred thousand dollars.

Q But you knew the tax return wasn't prepared, so you knew that wasn't finalized.

A I knew what Mr. Appling told us, sir. That's what I knew.

Q Did you know that Mr. Strickland was preparing it?

A I believe he told me that, yes.

Q Okay. And you've already told me you had a dim view of **[35]** Mr. Strickland's numbers.

A No. I had a dim view of Mr. Strickland's ability to testify in a rather complicated case given what -- given the outcome of his deposition. It had nothing to do with his numbers. It had to do with the way that he testified.

Q I believe the wording you used earlier was he -- you had been -- that the method by which the tax return would be calculated had been explained. Somebody had explained the method to you.

A I'm sorry, what?

Q Mentioned earlier that the -- that what had been explained to you by Mr. Appling at that meeting was the method by which the tax refund would be gained. I believe your quote --

A I guess you could say that.

Q -- was to explain that --

A I mean, I said what I said. As I recall it, I said that he had explained that this accountant had disclosed a way that he could go back and amend

some tax returns or maybe -- and it may have been current tax returns. But there was a way that he could obtain a refund, a substantial tax refund.

Q Okay.

A I'm not an accountant, though.

Q Okay. And then you were -- okay. And you were owed some money at that time, too.

A Yes. **[36]**

Q Were you paid something after that?

A Not that I recollect. I may have been paid something. I know that at the end of this whole matter I showed a loss of close to $26,000.

Q Okay. It looks like -- correct me if I'm wrong, it looks like you sent two invoices total.

A Sir, if you say so. I mean, if that's what I did, I did. I really -- I did not go back and look at my billing records.

Q Okay. Now, one thing ask now, your last invoice in this case is dated June 30th, 2005.

A Okay.

* * *

[40]

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BY MR. WILDER:

Q Mr. Gordon, so do you have any knowledge of when those -- that tax refund that was referred to by -- that you talked about in the March meeting was actually completed?

A Was received by Mr. Appling?

Q Or was actually completed and sent in to the IRS or done by Mr. Strickland at some point?

A No.

Q Okay. So no knowledge -- so you don't know whether it was done before or after billing or anything like that. **[41]**

A I know that in March of '05 Mr. Appling promised myself and Mr. Lamar that he would complete payment to us when he received a substantial tax refund which he expected to be in the neighborhood of a hundred thousand dollars.

Q Now --

A I know that I never received any of those funds. And my recollection is that it was June of the following year that I was told that no funds were -- you know, that basically the funds had been spent.

Q So you did not go to the November, 2005 meeting --

A No.

Q -- is what you -- you said the case was close to settling in November, 2005; is that right?

A In when in of '05?

Q Now I wrote it down as November, 2005 you thought the case was close to settling.

A It was toward the end of the year or the first of January of '06.

Q But now that contradicts the billing records, doesn't it?

A I didn't bill -- this bill stops on the date that I told you, which was June of '05 -- June 13th of '05.

Q Did you ever send any letters to Mr. Appling trying to collect your bill after June of '05?

A I don't remember.

Q Okay. And you never -- [42]

A I don't think I did.

Q And you never sued him or --

A I certainly contemplated it but no, I did not.

Q Okay.

A I did not have a signed fee agreement. I abandoned one of my own firm rules in that I did not have a signed fee agreement. Mr. Appling's mother was a church friend of mine. His wife was a friend of mine and --

Q Now, in --

A -- in retrospect I should have had a signed fee agreement; and, if I had, I would have sued.

Q Now, in the later -- you -- were you involved in the later fee dispute where Lamar, Archer sued Mr. Appling to collect on fees?

A I know that that was done and I -- there were some depositions that were held in my office --

Q Was there --

A -- that I was not a part of I don't -- as I don't recall being a part of that, but --

Q Okay. Were you involved in -- did you attend any depositions in your office in that case?

A I may have. If you can help refresh my memory on that, I didn't keep records of that because I --

Q Was there a --

A -- had not been paid for what I'd done before. **[43]**

Q Was there a deposition in 2012 with I believe Mr. McArthur was representing Mr. Appling --

A Yes.

Q -- where there was an altercation between you and Mr. Appling in your office?

A There was a comment which I wanted to make to Mr. Appling which I will now explain to you.

Q So I guess that's my question, there --

A Mr. Appling --

Q -- was an altercation between you and Mr. Appling in your office?

A I wouldn't call it an altercation.

Q Well, somebody shoved --

A There was a --

Q -- somebody else.

A There was a comment that I made, and I'll tell you what it was. I had been told by another client of mine that Mr. Appling and his wife were on a cruise ship. That had occurred within a few months prior to that depositions. That when Mr. Appling learned that these folks that he was seated with on this cruise ship were from Hartwell, my home town, he then began to gratuitously bash me and my firm and Mr. Lamar and his firm, and he went on and on and

on. And these people came back to me and said, "What is going on?"

Q So this is all information you heard as hearsay from a [44] third party?

A I then -- I did at the close of this deposition, I had a comment that I wanted to make to Mr. Appling which was that I was aware of what he had said, that I wanted him to be aware that if he continued to make slanderous remarks, that I would take legal action against him personally. He kept trying to walk out. He didn't want to hear what I had to say. He kept trying to walk out. And then he kind of pushed up his chest and bumped me out of the way. At that point, you know, he left, his lawyer left, and that was it.

Q So it's fair to say you all didn't have the best relationship as recently as 2012?

A Well, when you -- when someone maligns you gratuitously in the middle of the Atlantic Ocean on a cruise ship with somebody that he didn't know but who happened to know me, no, it was not the best relationship, particularly when layered upon the fact that he owed me over $25,000.

* * *

[63]

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BY MR. DAVENPORT:

Q Okay. I have handed you a document labeled Exhibit 2, which is a letter from you to Mr. Appling dated March 9, 2005.

Can you describe the circumstances that caused you to write this letter?

A I can. This is probably my most unusual letter to a client I've ever written in my 30-plus years of practicing law. As we said, we were having -- incurring significant past due balances and we were going to have this meeting, and then -- I don't know -- I guess "March 8th" it says, is a -- there's a letter, my letter to Mr. Appling, and then attached to that, Exhibit 2, is also an email from Mr. Appling to Mr. Davenport.

And we got this email and you showed it to me and, you know, it was -- not only were we not getting paid, but now Mr. Appling was accusing us of just not necessarily running up his fees, and it ended up with a one-page lawyer joke, the last line -- the punch line of which is "the moral of the story is there are three things in life are certain, death, taxes and being screwed by a lawyer." And when we received that we decided that we needed to go ahead and meet -- you know, take this head on. So I took some time and wrote this letter to Mr. Appling, and I think it says a lot about what was -- the issues that were going on in the litigation at the time, and **[64]** the problems we were having with our client at the time. And so I wrote this letter to him and said, "We need to move the meeting up" and we did, in fact, move the meeting up. And it was -- I think it was scheduled for the 18th at the time of this letter, I can't remember whether it took place on that day or shortly thereafter, it would be March 18th or the 20th, 2005 in Walter Gordon's offices in Hartwell.

Q But do you know what the amount of past due fees due to Lamar, Archer, Cofrin were at that time?

A They were in excess of $60,000, I think, $50 or 60,000, they were substantial.

Q Okay. So was there, in fact, a meeting at Walter Gordon's office?

A Yes, there was. It was -- Mr. Appling came in, Walter and myself, and we just began discussing -- it started out with the status of what was going on. Walter was more familiar with that than I, but -- and then we moved to the fees.

Q Okay. And what was the -- can you tell the Court the discussion that was had about the fees?

A Well, first of all, Mr. Appling, at the meeting, unlike the tone of the email which I had gotten -- or which you had gotten back in early March, at the meeting Mr. Appling was very effusive about how -- what a great job we had done, he had just lost his temper and was feeling pressure from all his business things, and was sorry he ever wrote that email, and we were **[65]** doing a great job and, you know, just wanted us to continue doing that, and he realized he had a past due balance and so, you know, we kind of said "thank you" for, you know, burying that hatchet, but we need to go ahead and pursue -- you know, find out what we can do about these fees, that we -- there's a bunch of work coming up and we just can't keep going at this burn rate.

He represented to us that really he had everything he had tied up in the business, there were absolutely no assets of any type available to satisfy our fees, but that he had met with his accountant and that they had already prepared the tax return for, and he -- because of this fraud that had been committed upon him he was going to get a

substantial refund, he represented in excess of $100,000, and that he would pledge that as soon as it came in, that would be sufficient to cover Lamar, Archer, Cofrin's fees, Mr. Gordon's firm's fees and -- that were past due, as well as going forward he would be able to pay the fees out of that refund. And based upon the fact that he said he already had the tax return prepared, it was going to be filed eminently, and he made that pledge. And based upon, also, the fact that there was no other assets there, we agreed -- at least I agreed, on behalf of Lamar, Archer, and Cofrin, that we would continue to work, not pursue collection efforts, not withdraw and we would continue to perform work on his behalf going forward based upon those **[66]** representations.

Q And did Lamar, Archer, and Cofrin, in fact, continue to work on behalf of Mr. Appling and his company's behalf in that case?

A Yes, we did, a substantial amount of work. I think there were depositions taken. Again, you and Walter on the forefront of that, not I, but there was a substantial amount of work done after that amount of time getting ready for what we thought was an upcoming trial.

Q Was there another meeting that, in part, related to the unpaid fees in November of 2005?

A Yes, there was. We got -- most of the litigation had been wrapped up. I think the way it fell down -- fell in was that there were two claims. Basically there was a claim by John Davis for over a million dollars for purchase of the business, and there was a claim by a guy -- with Norga (phonetic) which was

another company that had been -- had some real estate dealings.

So we had settled the -- you and Walter had settled the John Davis portion of it, and then ultimately got -- later on settled in principle the Norga portion. So things were winding down, but Mr. Appling wanted to meet with us, sent us -- I think he sent us an agenda of what he wanted to talk about and the general agenda was he and his wife were going to come to our offices and they wanted to talk about the -- us **[67]** prosecuting a case on his behalf against George Beavers, the CPA that he had been utilizing in conjunction with the purchase of the business, and then also one of the topics was clearing up our fee issue.

And I don't know how much you've gone into it before, but basically when -- all along Mr. Appling had been very interested in pursuing a claim against George Beavers in Toccoa, Georgia, a CPA, and we from the outset said we'll be happy to do that but, you know, one thing at a time, we needed to get this fire put out before we moved to that.

We had used Bill Porter, a very prominent forensic CPA before, and we used Bill in the Hartwell Enterprises case, to get evaluation of ideas and stuff like that, it was expert testimony for that case, and our intent was we were going to use Bill as well based upon his knowledge in that case to pursue the claim on behalf of Mr. Appling against -- and Hartwell Enterprises against Mr. Beavers, and we had agreed to take that on a contingency basis once the Hartwell litigation was wrapped up.

So Mr. Appling was wanting to meet with us to discuss going forward with that, and we had a meeting in our offices, it was Mr. and Mrs. Appling, Mr. Davenport and myself attended that meeting; I think it was on November 2nd.

Q Okay. And specifically can you tell the Court what was discussed about both the unpaid fees and the tax refund? **[68]**

A Sure. Well, it started out talking about the Beavers' case and he was wanting us to proceed with that case. And I said, you know, we'd be glad to, but we need to get paid first, what's -- and what's the status of the refund?

And he represented to us that it had been screw up, that Mr. Strickland, the CPA had either not filed it or somehow misfiled it, and that he had to go back himself and refile it, and he still hadn't gotten the refund, but he expected it at any time.

And then he said, "Well, but let's don't wait on that, let's go ahead and proceed with the Beavers' litigation, we need to go forward with that."

And at that point in time I pushed back and said, and maybe you did, too, David, but I pushed back and said, "No, we're not -- we're going to do this one at a time. We've got $67,000 in fees out there and there's going to be a -- although Mr. Porter had some familiarity with it, there was going to be a lot of new work and professional expert testimony, et cetera, for this CPA malpractice case," and I just refused to proceed with it until we got paid with our fees.

And Mr. Appling was upset that we wouldn't go ahead and said, you know, "It's slam dunk, why don't we do it? Just take your fees out of that." And I refused and said, "No, we're not going to do that, we need to get our fees paid, and then we'll be glad to do it." **[69]**

And so that's basically how the meeting broke up, was he was disappointed that we wouldn't proceed with the Beavers' and I was disappointed we didn't have fees, but we agreed to move forward based upon his representation that he was still waiting on his refund check, and then would give it to us -- apply it to our fees when he got it, and there was, you know, fairly minimal stuff to do in the wrapping up the settlement at that point in time with Norga, but we proceeded to go ahead and do that based upon Mr. Appling's continued representations.

Q What would you have done if Mr. Appling had told you he already had gotten a tax return and either spent it or was not going to pay Lamar, Archer, and Cofrin out of that tax return?

A Well, it would have been a very short meeting and it would have ended at that point in time and we would have started a lien on our files and withdrawn from all of our representation.

Q When did you or Lamar, Archer, and Cofrin first learn that Mr. Appling had, in fact, received a tax refund, and also that he was not going to pay any, not a single dollar, to Lamar, Archer, and Cofrin out of that tax return despite his earlier promise to do so?

A It was sometime in June of 2006, and I don't remember the exact -- how the message was conveyed to me, but I think it may have been in a conversation -- I may have called Scott, but I can't remember exactly, but I learned at that time for the first time in June of 2006 that, you know, the check had come **[70]** and he had spent it, or had used it elsewhere and was not going to pay us anything.

Q And what did you do as a result of learning that he had received the check?

A I wrote him a letter, I sent it certified mail, the letter is dated June 26, 2006. It's -- it's Exhibit 3, you just handed me, in this matter --

Q Yes.

A It's got another Exhibit Number, and that was from Mr. Appling's deposition in the Hart County litigation, I believe.

Q And would you just read to the Court, looking at Page 3, the second paragraph, the -- beginning with -- well, that second paragraph on Page 3.

A The first full paragraph you are referring to?

Q Yes.

A Okay. It says:

> "Not only are the amounts now due pursuant to the original fee agreement entered into among us, they were also the subject of a special agreement and representations by you to induce us to continue representing you through settlement.

> Through my letter to you of March 9, 2005, we gave you formal notice of our intent to withdraw from your representation and of the Gordon law firm's intent to **[71]** withdraw if your outstanding invoices, which included the amounts currently still past due, were not properly brought current or satisfactory arrangements not made for their -- for future payment.
>
> In response to that letter, in a meeting we had with Walter Gordon, you represented to our firm and the Gordon law firm that you were entitled to a refund of taxes from the IRS which would be sufficient to cover all of our outstanding and anticipated invoices, and you promised to utilize that refund when received to pay our outstanding and future invoices. Based upon that representation and that agreement, both the Gordon law firm and this firm did not withdraw from your representation and continued our work, achieving ultimate settlement of your claims.
>
> We have now learned through you that there was, in fact, a tax refund applied for and obtained by you, but that you utilized all of the proceeds of that refund for other purposes, and none of those proceeds were ever pai to either this firm or the Gordon law firm."

Q So is it your recollection that you learned, either in late May or probably June, for the first time about Mr. Appling receiving the tax refund and not paying any monies to Lamar, Archer, and Cofrin? **[72]**

A That is correct. I think it was closer to the date of this letter because I wrote it, I think, in response to just finding that out.

Q Okay. Did Mr. Appling ever call you or write or say anything to you denying that statement that you just read out of that letter?

A No, I -- he did not.

MR. DAVENPORT: Your Honor, just for housekeeping purposes I would move for the admission of Plaintiff's Exhibits 1, 2 and 3.

MR. WILDER: No objections, your Honor.

THE COURT: All right, Plaintiff's 1, 2 and 3 are admitted.

(Plaintiff's Exhibits Numbers 1, 2 and 3 were received in evidence)

MR. DAVENPORT: Thank you, your Honor.

(Counsel confer)

BY MR. DAVENPORT:

Q Did Mr. Appling call you, and did you have any telephone conversation with him subsequent to your sending your letter that you -- of June 26th, which was Exhibit Number 3?

A I did not receive anything. And I also -- give you a letter, which you've handed to me as Exhibit 4.

Q Okay.

A He did not call me or have any other email communication **[73]** that I remember.

Q Okay. Can you tell the Court what Exhibit Number 4 is?

A It's a letter dated July 19, 2006, also sent via certified mail to me from -- on the Hartwell Enterprises, Inc. letterhead signed by Mr. Appling addressing the letter of June 26th that I had sent him.

Q Does he, anywhere in this letter, deny or dispute or answer the statement in your March -- your June 26th letter regarding the agreement to pay Lamar, Archer, and Cofrin out of the tax refund?

A No. As the Court will see, there's no even really reference to the March meeting and any of the promise to pay us the tax refund.

There is, however, a reference regarding the November meeting, and he says -- basically he said after that meeting in our offices with he and his wife -- with him and his wife, that he -- his next course of action was to go to a bankruptcy attorney, and after meeting with that bankruptcy attorney that attorney represented that he not use the refund to pay us, and he states "It should be obvious as to what I chose to do since we are still -- what I chose to do," that's regarding the refund, "since we are still open," that meaning Hartwell Enterprises is still open. So, anyway, that indicates to me that -- well, I'll stop there.

Q Now does -- he gives the date of the meeting as October **[74]** 20th, 2005. Is that the accurate day of the meeting?

A I believe it was November 2nd, that was my recollection in the time records, and also I mean, I

think that's even been admitted in the pleadings by Mr. Appling in the pleadings.

Q Does he state anywhere in this letter that he already told you at the October 20 -- or November 2nd meeting, whichever date you may choose, that he had gotten the tax refund and he wasn't going to pay Lamar, Archer, and Cofrin?

A No. I mean it's -- and now it just -- he just says after the meeting he met with a bankruptcy lawyer, and the bankruptcy lawyers told him, well, maybe you should use it for your business instead of going and giving it to Lamar, Archer, and Cofrin. That's why I was surprised when we got to the position in this case that he started out that -- at that meeting he had told us he had already spent the refund and wasn't going to pay us.

Q Okay. And does this statement on the top of Page 2 that you read, "It should be obvious as to what I chose to do since we are still open," does that contradict any claim that he advised Lamar, Archer, and Cofrin at the November meeting that he had the tax refund and wasn't going to pay Lamar, Archer, and Cofrin out of it, or that he wasn't going to pay Lamar, Archer, and Cofrin out of it even if he had not received it at that time?

A Well, I mean, I'll let the Court draw that conclusion, but **[75]** my -- my under -- you know, my feeling was when I got this letter, I said, "Well, you really did already get it and spend it," that's the first time I knew about it -- kind of a real confirmation that it had come and gone.

I will note that when I took his deposition in the Hart County case he gave yet another

explanation as to when he had made the decision to spend the money. He said in that deposition that he had met with the attorneys that he later hired to represent him regarding Mr. Beavers and he said, "Well, I got this money" and they told him, "Well, you don't need to give it to Lamar, Archer, and Cofrin, they've been paid enough," and so that was his excuse in the deposition why he didn't pay us, so that's another version of why he didn't pay us.

Q So at no time prior to June of 2006, which was three months after the settlement of the entire Hartwell Enterprises/Appling lawsuit against Harrington Enterprises, Norga, Sunbelt, at no time did he ever tell you that he had the check and/or also that he wasn't going to pay Lamar, Archer, and Cofrin out of those proceeds?

A Absolutely not, he never told us that.

Q Okay.

A Told me that.

Q And was it your understanding throughout the representation, up to the dismissal of the underlying suit in **[76]** March of 2006, that he still had not received the tax refund check?

A Correct. I was getting -- beginning to get curious at that point in time why it was taking so long, but it had been a November meeting. He said he had had to redo it, and so I just assumed he hadn't gotten it yet.

Q Okay.

A And I say, our role, at that point in time, the litigation had wound way down.

Q Okay. Now at some point in time, after this lawsuit, or this adversary proceeding began, and discovery was exchanged in this proceeding, did Lamar, Archer, and Cofrin receive an amended US Individual Income Tax Return for the year of 2000, which is Exhibit Number 9 and I have just handed to you?

A Yes, we did. I think it was that -- well, I can't remember exactly, but it was the first denial of any existence of this tax return, and then ultimately I think it was at a -- it was at Mr. Appling's deposition that I was given this, or he may have gotten it from Mr. Strickland's deposition, but it was gotten at a deposition, we received a 1040X Amended US Individual Tax Return for Scott and Connie Appling for tax year 2002.

Q Okay. And what is the amount, first of all, that is being requested as a tax refund on this amended return?

A Well, the -- the -- [77]

Q On the first filing?

A Right. The return was dated June 15, 2005, and the amount requested was $60,718.

Q And so this -- that's Mr. Appling's signature, as best you know, and it's dated June 15, 2005?

A Well, it represents on the form this is -- Mr. and Mrs. Appling's signatures are authentic.

Q And his wife's signature?

A Correct.

Q And that was some three months after the March meeting when he pledged -- when he had advised you what as to the tax refund?

A Well, he represented at the March meeting that the return had already been prepared, was ready for filing, and that he was going to get well over 100 -- get over $100,000.

Q Okay. And can you explain to the Court, based upon these documents produced in discovery, what the IRS's response was to this June request, and what subsequent actions Mr. Appling took?

A Well, the IRS rejected this request, from our discovery, and requests that a revised request be filed, which was filed, I think, in August and said that he should be getting a refund within a few weeks. The IRS reacted to that, approved it, and changed the amount slightly, and I think it was $59,000 ultimately, and reported that he should be receiving a check in [78] a few weeks.

Q Okay. Now can you tell the Court what representations that were made at the March meeting that you believed were not -- were not true or were false?

A Well, based about what we've learned, first of all, I think it's -- it was -- and I didn't know this until the bankruptcy filings in this case, he represented at the meeting that he had absolutely no assets whatsoever to pay our legal fees other than his tax refund, and now it appears he had an IRA, according to the filings in this Court, with several hundred thousand dollars in it at that point in time which could have been utilized, albeit with penalties, but it could have been utilized, but he represented he had

absolutely no assets other than the tax refund, so that's one.

Secondly, he represented that he had a tax return already prepared that was going to show a refund of over $100,000, and as we learned through discovery it apparently was not prepared and it was also not for that amount.

Q And then at the November meeting, can you tell the Court what misrepresentations or representations that were not true were made by Mr. Appling?

A Well, first of all, if I had known either of those two things I just said on the March meeting we would have withdrawn at that point in time.

But going onto the November meeting, he represented **[79]** that he had not yet gotten the refund, and that he still expected to get an amount sufficient to cover all our fees and taxes, and that we should proceed with the Beavers' case, and that -- based upon that misrepresentation, which we now know he -- he says now he had gotten it and spent it, based upon that misrepresentation we continued to represent him and did not pursue immediate collection efforts, which I might state, it appears from looking the financial records that we got, and I will shed a little light on this, (indiscernible) my attorney hat on for a second, we sought a bunch of discovery of Hartwell Enterprises, Inc.'s financial records in this case, and were advised that all of them had been destroyed or taken over by the bank, they weren't in Mr. Appling's or his lawyer's possession, so -- but getting back to -- it appears that at that meeting he had not spent all of the money

that their -- the records show there was substantial capital contributions made by him after that meeting, so whether he had had it or not was -- he definitely had it, according to his testimony, at that -- by the time of that meeting. He represents now he had spent it by that meeting, but the records seem to reflect otherwise. But I didn't know any of that so I didn't rely upon any of those -- what we now believe were incorrect statements at the meeting. But if I had known that he had gotten the money and spent it at that meeting, we would have withdrawn and not worked to further consummate the settlement. **[80]**

Q And is it fair to say that his -- Lamar, Archer, and Cofrin wasn't relying upon a representation from or payment from future income from the business, but rather from the tax refund specifically?

A Correct. Mr. Appling was always complaining about what bad shape the business was in, he was always undercapitalized. There was no expectation of payment from the business. He was barely, according to him, barely keeping the doors open, and so we were looking solely and, again, because that was the only asset he had supposedly, we were looking solely at his tax return.

MR. DAVENPORT: Your Honor, I'd move for the admission of Plaintiff's Exhibits 4 and 9.

THE COURT: Any objection?

MR. WILDER: No, your Honor.

THE COURT: Which is Plaintiff's 4?

MR. DAVENPORT: That's the July 19 letter from Scott Appling to -- to Bob Lamar of Lamar's recovery.

THE COURT: Okay. Plaintiff's 4 and Plaintiff's 9 are admitted.

(Plaintiff's Exhibits Numbers 4 and 9 were received in evidence)

BY MR. DAVENPORT:

Q Now at some point did Lamar, Archer, and Cofrin decide to file suit against Mr. Appling individually to recover the [81] unpaid fees that they had not been paid?

A We did for the first time in our 32 years as a firm, we filed a lawsuit to collect fees, and this is the case.

Q Okay. And what was the result of that lawsuit?

A There were Cross Motions for Summary Judgment, and the Court entered judgment on behalf of Lamar, Archer, and Cofrin on October 31st, 2012 in the amount of $104,179.60.

Q Okay. And I have handed you a document labeled Exhibit 6, which is titled "Order and Judgment."

Is that the Order and the Judgment that was entered in the underlying case?

A It is.

MR. DAVENPORT: I would move for admission.

MR. WILDER: No objection, your Honor.

THE COURT: P-6 is admitted.

(Plaintiff's Exhibit Number 6 was received in evidence)

(Pause)

MR. DAVENPORT: I have no further questions at this time.

THE COURT: All right. Mr. Wilder?

MR. WILDER: Thank you, your Honor.

CROSS EXAMINATION

BY MR. WILDER:

Q Mr. Lamar, how long have you been practicing law?

A Since 1976. **[82]**

Q Okay. And after you took the case in June 2004 you, I guess, associated Walter Gordon?

A Yes, we did. We thought it important to have local counsel for just, A, for filings and dealings with the Court in Hart County, as well as a potential jury selection going forward.

And we also knew we were going to be going remediate ex parte relief as well as temporary preliminary injunction relief, and that -- well, that we were on a short time fuse and we needed local counsel to make filings with the Court, set up schedules, et cetera.

Q So you were pretty much in constant contact with him throughout the case?

A I was not. I've talked to Walter about working together with us, and then David Davenport took over the day-to-day contact.

Q Okay. So your firm was, your firm has knowledge of that?

A I don't know what you mean by "constant." We were in frequent contact.

Q Okay. Okay. Do you remember that the business was purchased, I guess, June 4th 2004?

A If you say so, I'm not familiar with it.

Q And Mr. Appling came to you less than a month later to get the -- get the deal rescinded.

A He came to me -- I met with him on July 3rd was our first **[83]** meeting.

Q Okay. So pretty much right after the deal he came to you to try to get it rescinded would be an accurate statement?

A We tried to get -- well, we weren't -- our first goal was not to get it rescinded; our first goal was to have -- to be able to get him to stop making payments because he represented he was going to go in default on the end of the month of July, and if we didn't get that stopped he was going to lose his house, he was going to lose his mother's house, the business was going to go under, and so the first -- the first goal was not to -- ultimate victory, but to stop the bleeding and stop the eminent foreclosures that he represented were going to occur.

Q So before -- I'll present to you a document I have marked as Defendant's 3. Can you tell me what that is?

A It appears to be the Complaint that was filed in Hart -- Franklin County Superior Court, I'm sorry.

Q Okay. Paragraph 1, Introduction, can you read the first sentence?

A I'm sorry?

Q Can you read the first sentence of Paragraph 1 under the Introduction?

A "The Plaintiff seeks to rescind his purchase of Defendant's businesses on the grounds that the purchase was induced by false representations and/or on grounds of mistake." **[84]**

There's no dispute here that was the ultimate goal was to get it done. I'm just saying on -- in July of 2005 the -- or was it '04? 2004, the goal was to avoid having to make a payment on July 27th or 28th. Then we were going to move to rescind the --

Q Okay. And this is the suit that you prepared, or your office prepared?

A Correct.

Q Now I will represent to you and look through the suit and make sure you're okay with it, it appears to me that Hartwell Enterprises and Mr. Appling were having cash flow problems and problems paying and problems with this business from the very start, would that be an accurate representation?

A That's what he represented to us.

Q Okay. And after you did that verified Complaint --

MR. WILDER: Well, Judge, we'll go ahead and move to admit D-3.

THE COURT: Any objection?

MR. DAVENPORT: No objection, your Honor.

MR. WILDER: Okay.

THE COURT: Admitted, D-3.

(Defendant's Exhibit Number 3 was received in evidence)

BY MR. WILDER:

Q Now after you took, I guess, Mr. Appling's word for it in the verified Complaint you did some work on it, I would expect **[85]** and do you know Mike Strickland?

A I have never met Mr. Strickland. I know -- I've heard of him, I've never met him.

Q Okay. Do you know what his role was in the case?

A I believe he was Mr. Appling's first, you know, CPA for the business and personally at that -- at that point in time that we were dealing with it.

Q You mentioned a letter I have marked as D-4. Now if the letter from Mr. Davenport --

THE COURT: I can't pick you up, Mr. Wilder, use the mic, okay?

MR. WILDER: Sorry, your Honor. I'll get better at it.

THE COURT: Okay. Thank you.

BY MR. WILDER:

Q This appears to be a letter from Mr. Davenport to your -- or to Mr. Malcolm who represented one of the Defendants, I suppose.

The middle of that letter says that "Mike Strickland has advised that the business is operating at a loss." So this accountant, as of September 2004, had let -- your firm, at least, knew that the business was operating as a loss?

A I have never seen this letter before, I'm not copied on it, I have no knowledge of it.

Q Okay. This letter appears to be on your firm letterhead? **[86]**

A Sir, there's a lot of letters that go out on my firm letterhead that I don't see or have any knowledge of.

Q Do you recognize Mr. Davenport's signature?

A It appears to be David Davenport's signature.

Q Okay. Would you agree with me, even without this letter, that your firm knew that the business, Hartwell Enterprises, was not cash flow positive?

A I can't -- again, I'm not -- was not on the front lines, I was not examining financial records of Hartwell Enterprises. I have no knowledge as to what, on a day-to-day basis, Hartwell Enterprises' financial status was, cash flow or otherwise.

Q Okay. I have handed up to you -- I handed to you a document attached -- or that I've labeled D-5, and this appears to be financial statements of Hartwell Enterprises that were given to your firm.

Do you know if your firm received financial statements of Hartwell Enterprises from Mike Strickland?

A I believe we did receive some. Some there's -- I don't know whether we ever received this one or not.

Q Okay. Wasn't it part of the case that the Defendant had to get financial statements of Hartwell Enterprises each month for a while?

A Yes, sir. I was not privy to -- I did not attend the TRO hearing, I did not review the discovery, Mr. Davenport and Mr. Gordon were handling all of that, so I don't -- **[87]**

Q You did not attend the TRO hearing they were on?

A I did not. We did not need three lawyers at a TRO hearing. Mr. Davenport and Mr. Gordon were there.

Q Do you know who Mr. Porter is?

A Yes. William Porter, I do, yes.

Q Okay. Did you know that he completed a financial report for your firm in this case?

A In which case?

Q In the suit against -- Hartwell Enterprises' suit that you handled for Mr. Appling.

THE COURT: Mr. Wilder, let me ask you to rephrase. I think I know what you're asking, but you said he prepared a financial statement for the Lamar firm. I think you meant he --

MR. WILDER: Yes, I'll correct that, your Honor.

THE COURT: Okay. Yeah.

BY MR. WILDER:

Q Mr. Lamar, were you aware that your office solicited and was provided a mediation report/financial statement from Mr. Porter regarding the business that Mr. Appling was running?

A I am aware, generally, that we retained Mr. Porter on Mr. Appling's behalf to do an analysis of his -- of the Hartwell Enterprise business at the time of his acquisition by Mr. Appling back in, I guess, whenever that was, June or May of 2004, yes. **[88]**

Q Have you seen the report?

A No.

Q Okay, so you never saw the report?

A No.

Q Okay.

A I mean, I may have seen it -- the cover of it, but to go through it and read it and analyze it, no, I never did.

Q Okay. If I -- if I let you know that Mr. Porter had determined the business was worth somewhere between 270,000 and 630,000, would that be consistent with your knowledge of that case?

A At -- probably not. What -- at what period of time? And I understood Mr. Porter was in a business of evaluation for -- in a definite period of time, not just an ongoing rolling business evaluation.

Q As of the date of purchase, which you mentioned as of June the 4th, 2004?

A I have seen that in Mr. Appling's letter that somebody did a business evaluation. It says in here somewhere that he -- it was 253 --

MR. DAVENPORT: Your Honor, I would object. If he wants to question Mr. Lamar about this "report," then he should provide him with a copy of it so that Mr. Lamar can review it and determine whether it's even -- it's already been labeled as prepared for mediation, whether it's certified or not, what the **[89]** purpose for it was.

THE COURT: Well, he's already testified that he doesn't remember seeing it, Mr. Wilder. Now if you want to show it to him and see if it refreshes his recollection, that's fine, but he's testified he doesn't remember seeing it, so proceed.

The objection is sustained.

BY MR. WILDER:

Q Mr. Lamar, I have marked this report as D-5, I think.

Do you recall seeing this?

A Just give me one second, please, let me look through it and see if there's anything. **(Witness reading document)**

No, I do not.

Q Okay.

A I mean, I think I may have seen the cover page.

Q Who is this addressed to?

THE COURT: Hold on. Do we have a problem?

(Court/Clerk confer)

THE COURT: No, this is D-5. This is the same D-5 financial statement of Hartwell that you were referring to earlier, correct? Do we already have a D-5?

MR. WILDER: Here's what I have.

(Counsel/Clerk confer)

THE COURT: Mr. Wilder, during lunch, this case was filed in June of 2013, during lunch I expect you to mark all of **[90]** your exhibits and have them ready so we're not marking them as they are presented, okay?

MR. WILDER: Yes, your Honor.

BY MR. WILDER:

Q Okay, Mr. Lamar, you said you were not aware, you do not remember this report?

THE COURT: Is this D-6 now?

MR. WILDER: This is D-6, yes, sir.

THE COURT: Okay.

THE WITNESS: I do not -- I know Mr. Porter was preparing a business valuation report, and I may have seen the front page of this just sitting on a conference room table or something, but I am not familiar with its contents.

BY MR. WILDER:

Q Okay. And are you aware, during the case, that Mr. Porter determined that the valuation of the business was much less than Mr. Appling paid?

A I believe I was generally aware of that, yes.

Q Is that a "yes," you were aware of that?

A Yes.

Q Okay. Mr. Lamar, I'm showing you a packet, this is going be labeled D-7, these are invoices from your firm.

Does that appear to be what they are?

A It appears so.

Q Okay. You would -- **[91]**

A Some of them are -- there are copies that are cut and pasted, it looks like. I mean, for example, there's an invoice LB-440 that looks like it's been cutted and pasted.

Q And you would have time records on these?

A These were generated from time records from attorneys at Lamar, Archer, and Cofrin, correct.

Q From your office? Okay.

A But let me say that I -- you know, this is a stack of documents a half an inch thick. I have not gone through and verified that these are the exact time records that we submitted to the Court in Franklin -- in Hart County that became the object of the judgment in this case -- in that case, but they generally appear to be time or billing records of Lamar, Archer, and Cofrin.

Q Okay. And I guess what I want you to do, follow with me, it looks like there are, and this is my premise, and tell me if you think I'm correct without going through these, there are a ton of time records in here that say "Discussion of company financials," "Discussion of company financials," "Three months of company financials," "Lots of review of company financials," and I am looking at time records on

09/17/04, 09/20/04, 09/27/04, 10/01/04, 10/13, 10/04, 10/19, 11/08, and then there's "Review of valuation" on 11/17; "Discussion of financials on 11/29," there's a whole bunch of places where "company evaluation" was discussed and reviewed by attorneys at **[92]** your firm.

A Do you have a question?

Q Is that consistent with your recall of the case?

A Again, if you're look -- look for example -- I mean, obviously, yes, I'm not saying any time record entries, I have knowledge of what these time records reflect or work that was done at the time.

I will acknowledge it generally involved, and as an issue in the case I was aware of the financial condition of Hartwell Enterprises, Inc. at the time it was purchased from Mr. Davis was the major issue in the case, and the subject of the rescission action.

Q And --

A For example, though, you asked me about these -- what I know about these time records. The September 17, 2004 time record, you pointed out, typifies my role in the case. I have three entries in the time record. Both of them are conferences regarding tax return issues and strategy, a conference with Mr. Gordon regarding hearing strategy. That's the type thing I was involved in, not the day-to-day.

Q And now you are here as a representative of the firm, I guess. And my question is, your firm had pretty intimate knowledge of the company's financials throughout this case, ongoing financials?

A We had a pretty -- I had, I think, pretty intimate **[93]** knowledge of the conditions of the business when he bought it, and to some extent, as for a period of time we got financials on the -- I believe on the business's operations, but again I wasn't privy to reviewing those. Mr. Davenport may have been.

Q Okay. Okay. But if the time records say it, you know, billed for it, pretty much you did it, is that a fair statement?

A If the time records say we did something, then -- and these are the time records, then that's what we did.

Q Okay. Going to March 2005, okay, you talked about what you did. Now this meeting was at Mr. Gordon's office, is that right?

A Correct, in his conference room.

Q Okay. So it was you and Mr. Gordon and Mr. Appling?

A Correct.

Q Okay. Anybody else, do you remember?

A Not that I remember.

Q Okay. Did you make any notes from that meeting?

A No, not that -- well, not that I have. I don't know if I did or not.

Q No notes. Did you send a letter after the meeting that says, "Mr. Appling, you agreed to give -- pay the tax refund over?" Did he sign off on it or something like that?

A Not that I remember.

Q Okay. Did you contact the IRS about a tax refund, try to **[94]** seek an assignment of it?

A No

Q All right. Did you --

A I trusted Mr. Appling.

Q I'm sorry?

A I simply trusted my client, Mr. Appling.

Q Okay. Did you contact -- now you said that you thought the tax refund document had already been submitted, the tax refund -- or return?

A No. I don't think he represented it was submitted. It had already been prepared, he had seen it and it was ready to -- ready to be filed.

Q Okay. So your testimony is that it was prepared, but not submitted?

A Well, correct.

Q Did you --

A That was my understanding from the conversation. I definitely know he said it had been prepared and he represented, you know, it was ready to be filed.

Q Okay. So did you contact Mr. Strickland about the preparation of it?

A No.

Q Did you know Mr. Strickland was preparing it?

A I assumed -- well, I had no idea who his CPA was. I heard Mr. Strickland. I assumed he was

somebody -- a CPA -- he said **[95]** his CPA had prepared it already and was ready to file.

* * *

[98]

* * *

Q Well, this case -- you have pled -- it looks like the total billed on this invoice was 189,496.73. Is that roughly what you think was billed to Mr. Appling's case?

Now I just -- I represent to you that I have just added up these invoices that are actual Invoice LB numbers and not finance charge numbers.

A If you represent it and that's what the math shows, that's what it shows. I can't verify it one way or the other.

Q Does 189,000 sound somewhat right?

A It was well over $100,000 I know that. It was well -- you know, it's --

Q And this invoice reflects total payments of $135,892.47, does that sound about right?

And I'll represent to you I've just added up the payments here that are listed.

A All I know is the balance is in the -- was in the -- without finance charges was, I think it was $60-some thousand.

Q Okay, so it's roughly consistent with the balance? So it's not like Mr. Appling paid you nothing for the case?

A No, he did pay a substantial amount of money.

Q Okay, now, I want you to split the time --

A And got a substantial benefit.

* * *

[121]

* * *

THE COURT: All right. Well, as -- and you don't need to respond, Mr. Davenport.

I'm going to deny the motion for this reason. Number one, the evidence is, is that the debt grew from 60,000 some odd dollars to $104,000. Yes, there were payments, but there's no evidence that those payments were made on those specific invoices.

Usually payments are applied to the oldest invoice, so there was -- there's no evidence there was an agreement that, from that point on, Mr. Appling was going to pay on a go-forward basis. [122]

So I don't accept your argument that there was no additional credit extended.

Also, the evidence that I have so far -- I'm not concluding this -- but based on what I've heard -- you may be able to contradict it -- but the evidence is, is that Mr. Appling made a representation that he had a completed tax return that he had seen and that his accountant had advised him that he was going to get a tax return of a hundred thousand dollars.

I also have evidence that, subsequently, an amended tax return asking for only $59,000 was actually filed.

So, so far -- and Mr. Appling may be able to deny this and contradict it, I have evidence in front of me to support the claim that Mr. Appling made a false representation about the tax return -- or the tax refund. And based on that, the Lamar firm continued to represent him. There's no requirement that you document representation or reliance.

There's no question that they knew that Mr. Appling and his company were having financial problems, but the law is unless you are on notice that something that is being represented to you is false -- i.e., the example the Supreme Court has given is I represent to you I am selling you a horse that is completed healthy, and I show you the horse, and you can see that the horse is blind, then you cannot rely on the representation that the horse is healthy. If you don't show me **[123]** the horse, I can rely on that representation.

So right now, I have no information that would suggest that the Lamar firm was in any way aware of any information that would suggest that Mr. Appling was lying about, one, the amount of the refund; or, two, the status of whether it was completed or not.

And so, as it stands right now, they have stated a case. They have made an initial showing -- they have made a prima facie case to support their claim.

So the motion to dismiss is denied, and you may now begin with your defense.

* * *

[126]

* * *

THE COURT: Okay. So how -- answer my question. How [127] does Mr. Appling's satisfaction and understanding of what was going to be provided him in the form of legal services and whether they met that -- his understanding, how does that in any way relate to the issue of what he told them at the November -- excuse me -- the March meeting and whether it was false or not?

MR. WILDER: Because when he told them that, he believed he was going to get the hundred thousand. We know that it changed --

THE COURT: Okay. That's fine. But whether he believed it or not has nothing to do with whether they completed the task that he expected them to complete.

MR. WILDER: It does in the sense that he also believed at the time they were talking about it that the completion of the task would result in lots of cash in his pocket.

THE COURT: No, that's not the -- that is not the claim here.

The claim is that he represented to them he was going to get a refund. There's not a -- there's not a representation here that he thought he was going to get money from some other source. The representation that's being alleged as being false is that he was going to get a hundred thousand refund.

Now, you can put your evidence on --

MR. WILDER: Right. [128]

THE COURT: -- and I'll listen to it as far as we go, but if -- I'm telling you if I don't see the relevance and if an objection is made, I'll sustain the objection unless I hear something that I'm not understanding. Okay?

* * *

[140]

* * *

Q Okay. Did you all have a billing agreement right up front?

A Well, before I signed their billing agreement, I asked him -- I explained to all them again I didn't have any money, and I said -- I said, "How much is this going to cost?"

And Bob Lamar said, "It could cost as much as" -- he said, quote, "It could cost as much as a hundred thousand dollars."

So when I read his agreement, I saw that, you know, there's no -- there's no -- you know, there's nothing guaranteed, blah, blah, blah. You might -- you know, you -- you know, we can't predict the outcome, but I took him at his word that, you know, it's only going to cost a hundred thousand dollars.

Like he said, he took me at his word. Well, I took him at his word.

Q Okay. So you --

A So I sat there for about five minutes, and I'm thinking to myself, "Where am I going to come up with a hundred thousand dollars?" I didn't have any money.

And so I didn't have any liquid cash. They referred to my retirement account. I didn't have any liquid cash. So I knew I had perfect credit -- **[141]**

Q Okay. So they worked for you for --

A I had perfect credit, so I knew I had --

THE COURT: Hold on. Hold on. Mr. Appling, now, Mr. Wilder is going to ask you a question --

THE WITNESS: Okay.

THE COURT: -- and you answer that question only. And then he'll ask you another one --

THE WITNESS: All right.

THE COURT: -- okay? All right. Mr. Wilder.

BY MR. WILDER:

Q Okay. So they worked for you for July '04, and they sent you -- it looks like the first bill in D-7 -- I believe you've got that up there --

A It was $50,000 -- 55,000.

Q Fifty thousand. And you paid that?

A I paid it the next day.

Q Okay. And then --

A I borrowed the credit -- I wrote a credit card check -- first of all, I had to write them a retainer when I signed the contract. I gave them a $10,000 retainer.

Q Okay. And then --

A I went home and cashed a credit card check to cover it.

Q Okay. So --

A Then they directed me to go meet with Mr. Gordon --

Q So then -- **[142]**

A -- wrote him --

Q -- in August --

A -- wrote him a $10,000 check --

THE COURT: Hold on. Mr. Appling, answer the question that he asked, and then he'll ask you another one. Okay?

MR. WILDER: And --

THE COURT: This is not your turn to just talk, and talk, and talk.

THE WITNESS: Yes, sir.

THE COURT: He asked you a question. You answered the question. Okay.

MR. WILDER: Okay.

BY MR. WILDER:

Q In August 2004, they attended a Temporary Restraining Order Hearing for you; is that right?

A Correct.

Q Okay. And then they sent you another bill in looks like September of 2004, for another --

A Fifty --

Q -- 55,308.84?

A Correct.

Q You paid that?

A I -- it took me to the end of the year to pay that, because I was already out of money. **[143]**

Q Okay.

A I had cashed -- I had $70,000 worth of checks, credit card checks -- with the two retainers to the both attorney firms and that first invoice, I was -- I was out of money.

Q Okay. Now, did you --

A So it took me a little bit of -- it took me a little bit of time to come up with the money to pay them, and I paid them in December of -- on that next $50,000 bill.

Q Did you believe that the -- that all of the legal fees, or pretty much all of them, had occurred by then?

A Well, here's what I thought. When I got the first bill, there was a letter from Bob Lamar explaining that they had -- as he stated on the stand -- that they had to jump through all these hoops to make these deadlines, to keep these people from taking action against me, and the reality is they were in second and third position on the mortgage.

Let's ask the jury -- I mean the Court what repercussion did they have at -- what could they have done to me? Could they have taken the business back? Yeah, they could have bought out the bank for $750,000 to take the business back --

THE COURT: All right.

MR. WILDER: Okay.

THE COURT: There's no question that that's responsive to. Okay? **[144]**

THE WITNESS: Okay. So --

THE COURT: Ask a question, Mr. Wilder.

MR. WILDER: Thank you, your Honor.

BY MR. WILDER:

Q Okay. And you also hired Mr. Gordon as local --

A Well, no. They hired --

Q -- counsel and got bills from him?

A -- Mr. Gordon.

Q Do what now?

A They hired Mr. Gordon.

Q Okay. You were paying Mr. Gordon. You paid him --

A I was paying Mr. Gordon.

Q Okay. Now, you had a meeting with them in -- at the TRO hearing time, at the temporary restraining order time?

A Yes.

Q Okay. And what was the substance of that meeting?

A Well, they froze the payments. And during that court, the CPA comes in with revised tax returns.

Q Okay.

A And at that point, the whole thing should have been thrown out of the court.

Q Were they -- were you and your business providing financials to --

A Yes, at that meeting --

Q -- Lamar -- **[145]**

A -- the judge wanted to make sure I wasn't pulling a scam, and he ordered that I provide monthly financials to the court and to the Defendants every month to prove that I did have the wherewithal to make their payments.

And I did that every month, including bank statements, all the way up until June -- until April or May -- until John Davis and I's agreement was signed in May of 2005.

Q Now, from your understanding, litigation primarily went from July 2004 to May 2005?

A Yes. June -- it went mainly -- trickled into June and July.

Q Now, I'm going to hand you a document I believe may have already been identified as Defendant's 5.

THE COURT: That was previously described as financials of Hartwell business.

THE WITNESS: And can I address the financials, your Honor?

THE COURT: If he asks you a question --

MR. WILDER: (Indiscernible).

THE COURT: -- you can.

THE WITNESS: Oh, okay.

MR. WILDER: Okay.

BY MR. WILDER:

Q This is a document that's previously been identified as Defendant's 5. **[146]**

A Correct.

Q Tell me what that is.

A This is a financial -- a monthly financial that Mike Strickland prepared. He was now my permanent accountant.

Q Okay. So he prepared this and this was sent to you. Where did it go afterwards?

A This was sent -- well, actually, it was sent to me, and sometimes it was sent to me and copied David Davenport, or I provided them to Mr. Gordon, and Mr. Gordon would look and them, and charge me to look at them, and then forward them on to Atlanta.

Q And so these type of statements were provided every month by --

A Every month --

Q -- you?

A -- and the bill -- their bills show -- are rife with review financials, review financials -- we can go over every page --

Q So your --

A -- in the billing showing that they reviewed my financials.

Q Your testimony is that if we went through the bills, that every line that says -- that says in their bills "review financials" --

A Exactly. [147]

Q -- this is what we're talking about?

A Exactly.

Q Is that right?

A All the way up until the end of the case.

Q Okay.

MR. WILDER: Judge, we'd move to admit D-5.

THE COURT: Mr. Davenport?

MR. DAVENPORT: No objection.

THE COURT: Admitted. D-5 is admitted.

(Defendant's Exhibit Number 5 was received in evidence)

* * *

[151]

* * *

BY MR. WILDER:

Q The business -- I'm taking it the business was not profitable at this point?

A No, sir. Well, you know, what I ended up finding out was -- which was kind of going with the story in the beginning -- was that he -- the owner, he escalated a contract, ran it through the business real fast instead of -- instead of sparsing it out and making sure his employees had work every week, which is what they normally did, and could sustain through the summer months and had business -- he escalated that contract and ran through that

production, which Mr. Reed couldn't understand what he was doing.

So when I came in, that contract was over with, and I had five employees with no revenue. I mean, I had two other customers --

MR. DAVENPORT: Your Honor, I'm going to object again. There's already testimony that the business was in dire straits. That's why the suit was brought and why there was a settlement with substantial savings.

This is not relevant to the issue before --

THE WITNESS: Yes, it does --

MR. DAVENPORT: -- the Court. **[152]**

THE WITNESS: It is relevant.

THE COURT: Mr. Wilder -- Mr. Appling, you're not arguing the legal points. Okay?

THE WITNESS: Okay.

THE COURT: When an objection is made --

THE WITNESS: Sorry, sir.

THE COURT: -- your lawyer argues. You --

THE WITNESS: All right.

THE COURT: You be quiet. Mr. Wilder --

MR. WILDER: I --

THE COURT: -- what's your response? Haven't I already ruled that all of this stuff is irrelevant?

MR. WILDER: Well, we're assessing the credibility of all of this stuff. I do agree with Mr. Davenport that we've had evidence on this, so I'm prepared to move on.

THE COURT: All right.

MR. WILDER: All right.

THE COURT: Move on.

BY MR. WILDER:

Q Okay. The March 18, 2005 meeting, you had some discussions with Mr. Strickland, I take it --

A Yes --

Q -- about tax returns.

A Yes. When I got --

Q Tell me about -- **[153]**

A When I --

Q -- those.

A Yes. When I got the letter from Bob Lamar pressuring the financial side of what I owed them --

Q This was the March 2005 letter that's already been admitted?

A Yes.

Q Okay.

A You know, I knew what that meeting was going to be going into Gordon's office, and I called Mike, and I said, "Mike, they're pressuring me to come up with some money," and I've -- you know, we've already cut my salary. My salary was supposed to

be 75,000 a year. There's not one year I got that. And the last two years, I didn't even have an income.

And so he said, "Well, let me think about this for a minute." And he said, "Well, you know, you've got these losses."

And I said, "Okay."

He said, "The IRS provides you with the ability to go back three years if you had -- if you had paid any taxes, to recoup your losses by going back and -- against those taxes you paid." And so he said, "What were your earning is 2002 and 2003?"

And I -- this was on the phone. This was a phone call conversation. And I said, "Well, you know, you know, my **[154]** last year, in 2002, I made $295,000." I said, "That's not including Connie's salary. That's just mine alone."

And he said, "Well, assuming a 28 percent tax rate, you would have paid over a hundred thousand dollars in taxes just on that year alone." And he asked me what I made in 2003. So he did a quick pencil on a calculator and came up with, you know, "Scott, you could -- you know, we can maybe get you as much as a hundred thousand dollars."

Q Okay.

A Now, I've heard three testimonies in this court --

Q Now, is that what you knew at the time --

A At -- at -- at --

Q -- of the year --

A At the time.

Q At the time of the meeting --

A And we'd already done my -- we'd already done my 2004 tax returns, so he was going to amend it, and go back, and carry those losses back.

Q So at the time of the meeting, you had not done through that --

A No, I had not --

Q He hadn't --

A -- done it. And at the time of that meeting, I didn't make a promise, because I couldn't promise what I didn't know I was going to get. It hadn't been done yet. **[155]**

There's three different testimonies that's going on with these tax returns and not a single lawyer got it right, but the closest one was Walter Gordon's explanation of it that the Judge didn't hear.

Q What --

A He was the only one that's --

Q Tell us what your explanation of --

A My explanation --

Q -- it is.

A -- is he carried -- he carried it back, he called me when it was ready, I went to his office in September, we -- I mean in June, we signed the paperwork, and he mailed it off.

Now, he could -- he could do -- he couldn't file it electronically, because it -- the IRS doesn't provide you to file amended tax returns electronically, so we had to mail them.

All right. So in my meeting, here they are telling me they're going to back out of my case two weeks before the pretrial hearing, or just days before the pretrial hearing.

Q Okay. What --

A And I had already paid these guys over a hundred thousand dollars. And I paid Walter Gordon thousands of dollars. I paid the accountant thousands of dollars. And I paid my other accountant thousands of dollars.

And so I'm sitting here thinking -- you know, okay, **[156]** so I guess I'll mention this tax return coming. And I said, "Look, Mike Strickland is working on amending a tax return," and that's exactly how Mr. Gordon termed it, "amended tax return." He was right. And he was also right that it hadn't been filed yet.

And so here comes June. I go down there and sign it, and it's -- June 15th, to be exact, and it wasn't a hundred thousand dollars. It was 60. And I said, "You know, what's wrong with this?"

He said, "Well, I did -- carried back calculations, and according to the IRS, this is what it's going to be."

And so I mailed -- he mailed it off, and I waited about three weeks -- it only takes about three weeks to get a check -- in four weeks to get a check from the IRS. I waited three, or four, or five weeks, and I didn't hear anything.

I called him up. He didn't hear anything.

So I called the IRS myself. Now, they want to say I was mad at my CPA, and that's not -- and

Mr. Davenport tried to bring that up in my deposition with Strickland, that I was mad at him. I wasn't mad at Strickland. It just -- it -- the IRS never received it. Mike said, "I mailed it." He said, "I'll mail it again."

I said, "Mike, I'm coming to your office right now." I drove from Franklin Springs, Georgia, an hour and fifteen minutes to his office, I got those tax returns, and I put them [157] in the mail myself to the IRS.

Now, I called the IRS when I found out it hadn't been mailed, and the woman who helped me told me to send them directly to her, which I did. They --

Q So as of the meeting time, the tax return had not been prepared?

A No, they had not been prepared.

Q And you did not make a promise to pay a hundred thousand over --

A No, I did not make a promise. And I'll tell you --

Q Were there --

A I'll tell you why -- the last thing they asked me, "Now, you're going to pay us with that money?"

I looked at both of them and I said, "Providing that it's what it's supposed to be. If he gets me a hundred, I'll be able to pay you," because already I owed them -- I owed them both almost a hundred thousand dollars.

* * *

[163]

* * *

BY MR. WILDER:

Q Mr. Appling, do these notes make any mention of any income tax -- offer, issue, or anything?

A No, sir.

Q Were you attempting to write down every issue that you talked about during the meeting?

A Yes, sir. Because we were --

MR. DAVENPORT: Your Honor, I'm going to object to the leading --

THE WITNESS: We were --

THE COURT: Whoa, whoa, whoa --

MR. DAVENPORT: -- aspect of that question.

THE COURT: An objection has been made. Stop talking, Mr. Appling.

What's the objection?

MR. DAVENPORT: Leading the witness.

THE COURT: I think that's a proper objection. Sustained. Why don't you rephrase?

MR. WILDER: Okay.

BY MR. WILDER:

Q Mr. Appling, tell me about these notes. What did you make notes about? [164]

A I made notes about what was coming up on the trial calendar: the May 1 deposition due; May 14th,

Linnet (phonetic) testimony; and June 14th, final pretrial.

To go on further -- and a comment about the final pretrial, Mr. Lamar wanted to -- stated that there was no way I was going to win this case, because of my lack of due diligence. Through the letter, he spelled out before the meeting -- stated I was in -- I was in -- it wasn't -- the case wasn't represented as how I represented it to them, and that -- in other words, he kind of alluded to the fact there was going to be no trial.

Well, here's my notes right here, pretrial, June 14th, so we --

Q Okay. Tell me --

A -- discussed those dates, and then I said, "How much is it going to -- how much" -- we're discussing this bill and the bills I owe them, I said, "How much is the trial going to cost me?"

And Bob says, "50,000 through the trial," and I got cap -- so he was in a -- I was going to have to spend another 50 to get to trial after I'd been told that the case, had it been front-end loaded in the beginning, in the first month of the preparation of the TRO, that they were ready for trial in August of 2004, David Davenport told me, and my wife, and my mother that they had front-end loaded the case, and that they **[165]** were ready for trial in August of 2004.

So I'm looking at another $50,000 bill, and then Walter wanted $10,000 deferred after trial, which I think was my -- I believe that was my retainer he was referring to.

Q Okay. So after --

A And -- and -- but he was -- but he was not going to cap it. There was going to be no cap.

Q So after this March meeting, I guess -- it never got to trial. You had some other meeting, in what time?

A Well, right after this meeting, I get a phone call from David Davenport, and it states that he's going to have to amend the case, because the judge ordered us to rework the deal, and I started screaming. I mean, I was livid.

And I said, "What do you mean, amend the case?"

He said, "The judge has kind of indicated that rescission is not possible."

THE COURT: He -- what was not possible? I'm sorry.

THE WITNESS: Rescission.

THE COURT: Rescission. Okay.

THE WITNESS: And I was livid. I don't -- here, I'd spent a hundred and -- well, so far, I mean, I was -- after -- and after that -- by the way, you -- as you touched on, after that meeting, I paid Lamar, Archer $25,000. I paid Walter Gordon, as he testified, 17,150, and I paid another 8,000 -- almost $10,000 to the expert witness, Mr. Porter. **[166]**

So it -- here I was, trying to commit fraud, but yet I was paying 40, $50,000 out to all these people.

BY MR. WILDER:

Q Okay. So the case was eventually settled?

A Well, I got the phone call and he says, you know, "I'm going to amend the case and I'm going -- I'm going to be in trial and I'm going to let Walter Gordon handle the negotiations with John Davis."

And so Walter took over the case, and it went back and forth for weeks, and weeks, and weeks -- back and forth, back and forth, back and forth, and I had laid out my -- my offer was --

THE COURT: Okay. Stop.

THE WITNESS: We knew what the --

THE COURT: Stop. Mr. Appling, the question was the case was eventually settled. The answer is either --

THE WITNESS: Yes.

THE COURT: -- yes or no. Okay.

MR. WILDER: Okay.

THE COURT: Now --

THE WITNESS: Yes.

THE COURT: -- if Mr. Wilder wants to ask another question --

THE WITNESS: Yes, the case was settled.

THE COURT: Okay. Answer the question that **[167]** Mr. Wilder asks you. Okay. Mr. Wilder.

MR. WILDER: Okay.

BY MR. WILDER:

Q When did the case settle? What month?

A It settled -- John's contract was signed on May 13th --

Q Okay.

A -- I believe. I provided a $38,000 check. That was no partial payment. That was the first -- that was not --

Q That --

A That --

Q That was the check that was identified earlier in the exhibit --

A That was the check that was identified earlier. That was the first installment of his quarterly payments on the $100,000 note.

Q So as far as you knew, the case was settled in May of 2005?

A The -- John -- the main case was settled in 2005. I've got my signed agreement on my desk -- on the desk over there with my signature and their signatures with a date of May 2005.

Q Okay. And you've already talked about your tax return you got back in -- what month was is you say that you finally got it back?

A I got it back in -- well, first of all, it came back in error. **[168]**

Q All right. Well, when you finally --

A The CPA --

Q -- got the money--

A The CPA --

Q -- when was that?

A -- had to redo it and send it back. The lady who I was working with sent me a letter in October -- what was it, the 26th or something is the date of the letter -- stating that they had finalized my tax return. It's on its way.

Q Okay.

A And it was for --

Q So --

A -- $59,000.

Q -- what did you do when you get the tax refund money back?

A I immediately called Bob Lamar.

Q Okay. And what did you tell him? What was the idea?

A I told him I wanted to meet him, and I sent him --

Q Okay.

A -- an agenda, and I told him I wanted to talk about our bill, and I wanted to talk about pursuing the Beavers case, as they promised.

Q Okay. When was that meeting?

A That meeting was the 1st of November.

Q Okay. And where was that at?

A In their office. **[169]**

Q Okay.

A And my wife and I were present.

Q Okay. So what did you -- what was the result of that meeting?

A It didn't go very well.

Q Okay. Well, what happened?

A I asked how much I owed --

Q Okay.

A -- and he brought a printout. And I asked Mr. Lamar if he would be interested in bringing the bill down.

Q Okay.

A And he didn't even flinch. He said, "We're not going to reduce it a dollar."

Q Okay.

A And I said -- and, you know, which, frankly, didn't surprise me. And then I said, "Well, when will you start the Beavers case?"

And the whole time, they had been -- they -- in the -- in our -- during our TRO meeting, Mr. Davenport stated that the -- when I asked him about the status of the Beavers case, he said the Beavers was a slam dunk. A CPA malpractice case was a slam dunk.

And I asked him about my legal fees, because I'd already paid the $50,000 on the first bill. And he told me then that I would get all my legal fees back from the first **[170]** case from the CPA malpractice case.

Presently in that meeting was my mother and my wife.

Q And that was the November 2005 meeting, so --

A No, that was the -- that was during the TRO.

Q So that was --

A That we were going to get our money back from the Beavers case, so when I went down in November, we said, "Would you take the Beavers case on?"

Bob Lamar said, "Well, no, I wouldn't be -- we wouldn't be interested in doing that."

And I said -- well, I said, "Why not?"

He said, "Well, on a contingency case, we'd have to spend another $30,000." He quoted a figure of $30,000. He said, "On top of your 55 that you owe us, you would be into us for $85,000."

He looked at my wife and I said -- "And that simply would be a bad investment for our law firm."

My wife looked at him and said, "What about the slam dunk CPA lawsuit that we've been hearing about for months?"

And even to the point that once Mr. Davenport got that insurance letter from Malcolm -- Jeffrey Malcolm showing that he had a million dollar policy, Mr. Davenport said that I would be able to get probably about a half a million dollars off those two policies.

Q Okay. [171]

A So what -- we were very interested in getting the CPA case started to recoup what he said was going to be our legal fees. And when he said, "Well, Ms. Appling, that -- there's no such thing as a slam dunk case," and he said, "And our firm is not willing to take the risk for $85,000." And --

Q So where did the money go, if you didn't pay Lamar, Archer?

A Well, I -- I looked -- I looked at her and she looked at me, and then, you know, we're basically at the end of the meeting, and he says, "Did you get your income tax return?"

Now, they -- they're sitting here denying that I said anything about my tax return. He asked me point blank did I get my income tax return.

Q This is in November 2005?

A In November 2005, which is the reason why I called the meeting. I looked at Mr. Lamar, and by this time I was very angry. The slam dunk case wasn't slam dunk any more. He wasn't willing to reduce the bill one dollar. Not one dollar.

I got stuck with the business. I got no money back. In the negotiations with John Davis, I asked for 250 to $350,000 back of the money I gave him because we had an expert witness testify that the business was only worth at the most 630. I had no working capital. I had no money. It's been -- it's already been --

THE COURT: Mr. Appling, Mr. Appling, the question **[172]** was what did you do with the $59,000.

THE WITNESS: I looked at Bob Lamar and I said, "Well, if I pay you this money, I go out of business. I didn't get what I thought I was going to get. If I pay you, I'm out of business this winter."

So if I keep the money, I'll at least have a chance at making what I got stuck with. And I looked at him and I said, "So I guess I think you know what my decision is going to be."

And my wife and I stood up and we walked out.

* * *

[176]

* * *

THE COURT: Okay. All right. We will conclude at this time.

Now, Mr. Wilder, I need you to work with Mr. Appling about the rules about testimony. I know Mr. Appling has a lot emotionally invested in this case, and I don't want to discount that in any way, but the trial will go much, much smoother if we can confine our answers to the question asked, and you develop your direct testimony a little bit better so he's comfortable that he doesn't have to just dump his brain out every time you ask him one question. He needs to be comforted that you will eventually get to the things that you all have determined will be important.

So I ask you to work with Mr. Appling.

You know, being a witness is not an expert thing, Mr. Appling, and I don't mean to criticize you in any way. It's just that we have to control this or we'll never get through. So work with your attorney about that.

MR. APPLING: Yes, sir.

* * *

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA

LAMAR, ARCHER & COFRIN, LLP, Plaintiff, vs. R. SCOTT APPLING, Defendant.	CASE NO: 13-03042 ADVERSARY Macon, Georgia Tuesday, September 23, 2014 (1:35 p.m. to 4:39 p.m.)

MAIN CASE: 13-30083
R. SCOTT APPLING AND CONNIE F. APPLING

TRIAL PROCEEDINGS

BEFORE THE HONORABLE JAMES P. SMITH,
UNITED STATES BANKRUPTCY JUDGE

* * *

[13]

* * *

BY MR. WILDER:

Q Okay. So let's follow the tax return before we return to the meeting.

Subsequent to you talking to Mr. Strickland -- and I believe you testified subsequent to the March meeting this tax return was amended for 2002; is that right?

A After the meeting.

Q Okay. So after you talked with Mr. Strickland and after the March 18th, 2005 meeting the

amended tax return was completed by Mr. Strickland.

A Approximately June 15th.

Q Okay. I call your attention to Plaintiff's Exhibit 9. Do you have that in front of you?

A The tax return?

Q The amended tax return.

A Yeah. Yes, sir.

Q Okay. Now, this is the tax return that you completed; is that correct?

A Correct.

Q Okay. And this was -- it looks like it was rejected by the IRS and then later it's submitted. I want to call your attention to the letter on the back. Can you explain to me what that is?

A Well, the -- **[14]**

Q The last page of this Exhibit 9.

A Yes, this is a letter -- this is the one that I had contacted when I didn't get anything in the mail after a few weeks and found out that she never received -- that they never received the first filing of the amended tax return. So I drove to Mike Strickland's office and picked up a copy and delivered it myself. And then it was kicked out, rejected. He had to make an adjustment. And she sent me a letter notifying me that it was being processed, that was decreased again and that I should have it in a couple of weeks. And the date of that letter is -- I think it was October 6.

Q Okay.

A 2005.

Q And you eventually got back less than you were expecting --

A Yes.

Q -- on the tax return?

A Yes, sir.

Q And how much did you get?

A I got 59,000.

Q Okay. And you were expecting a hundred?

A Well, I knew when we -- I knew in June when I signed it, it wasn't going to be a hundred, June 15th.

Q Okay.

A And Mike told me that the carry back formula just **[15]** didn't -- the formula that they used to prepare it just didn't pick up all -- every bit of my tax.

Q Okay.

* * *

[31]

Q Did you all talk about the tax refund at that meeting?

A Well, I first said -- that was the last thing we discussed. I first said to him, I said, "Well, wouldn't it be reasonable to assume that if you won that case, the slam dunk case, and I got this money back that I'd be able to pay you my bill?" And he told me that he'd rather write the debt off than gamble on $85,000.

Q Okay.

A So I looked at my wife and she looked at me and he said, "Did you get your tax return?" And we thought it would be pretty obvious that I got my tax return since I'm sitting here trying to negotiate to pay the bill.

I said to him, I said, "Bob," I said, "I, too, have to make a business decision" and that if I paid him the money I owed him, that I'd be out of business the next day and that I would rather take that money and try to keep the doors open on the business I was stuck with.

Q Your testimony is that you told Mr. Lamar in November 2005 that you had gotten your tax return money back.

A Absolutely. Without a doubt.

* * *

[40]

* * *

CROSS EXAMINATION

BY MR. DAVENPORT:

Q Now, Mr. Appling, you've testified about the March meeting and about your conversation with Mr. Strickland.

You never -- you're not today denying your testimony **[41]** from last week that you represented to Mr. Lamar and Mr. Gordon that you were getting in excess of $100,000 in a tax refund are you?

A I didn't testify to that last week. I didn't testify that I was going to get a hundred back. I testified

that Mr. Strickland said that I could possibly get a hundred back, and that's what I told Mr. Gordon and Mr. Lamar that I don't know what I'm getting back, there's a potential I get 100,000; if I get 100,000 I should be able to pay your bill. That was the last statement I made to them at the meeting's end. They asked me so you can pay this bill with this tax money. I said providing I get $100,000 back I can pay your bill.

Q You never told them you hadn't prepared the tax -- the amended tax return did you?

A It hadn't been prepared.

Q You didn't tell them that either did you at that March meeting?

A No. I said I just had a meeting with Mike Strickland and he's going to try to do an amended tax return. Mr. Gordon's testimony was dead on that I said that I had to do a carry back provision, and he even stated himself that he didn't know that I had, in fact, had prepared that yet.

Q That's because you didn't tell them you hadn't prepared it, correct?

A I didn't say I had. **[42]**

Q And you told them that you were going to get a tax return. We can agree on that, didn't you?

A Well, I wasn't -- that's exactly right. I can agree on I said I would get something back.

Q And you told them it was going to be in excess of $100,000 didn't you?

A I said that Mike Strickland said that it could be potentially $100,000.

Q You didn't tell them Mike Strickland said that. You told them --

A Yes, I did.

Q -- you were getting the tax return --

A No, sir, I did not.

Q -- didn't you?

THE COURT: Hold on. All right, all right. Mr. Appling, let Mr. Davenport finish his question and then you can answer.

THE WITNESS: Yes, sir.

THE COURT: Mr. Davenport, let him finish his answer before you ask another question. I can't pick up two people talking --

THE WITNESS: Yes, sir.

THE COURT: -- at one time on the record, okay?

THE WITNESS: Sorry.

* * *

[45]

BY MR. DAVENPORT:

Q Now, just going back to Defendant's 18, which is the 2002 W-2 --

A Yes, sir.

Q -- form that has now been introduced in evidence. You never produced this in discovery. In fact, you never provided this document to Plaintiff, Lamar, Archer & Cofrin until today; isn't that true?

A Nobody asked for it. That's true.

Q Well, we'll see about that. And on the form itself look at -- under federal income tax withheld, that line -- down under your name, the second box.

How much money in taxes did you actually pay in 2002?

A Well, just on this -- this W-2?

Q Yes.

A It was $64,000.

THE COURT: How much?

THE WITNESS: Sixty-four thousand four hundred and one dollars.

MR. DAVENPORT: Okay.

THE WITNESS: That's just on this W-2.

BY MR. DAVENPORT:

Q But that was -- you only amended 2002 tax return.

A No, it was carried back for three years and we went back and got money for 2002 and 2003. **[46]**

Q How much did you pay in two thousand --

A And my wife's income wasn't included in this -- on this page right here. My wife's W-2 was included for 2002. Her W-2 is included in the calculation for 2003, and my 2003 W-2 was included in that.

Q How much did you --

A But this obviously was the bulk of the money.

Q Did you bring your 2003 W-2 with you today?

A No, I don't have those.

Q How much did you pay in 2003?

A I don't know. She made about 40, 45; I made 18.

Q You made 18.

A Yes, sir.

Q So out of your salary how much of that 18,000 did you pay in federal income tax?

A I don't know.

Q Did you pay any?

A Oh, I'm sure I did.

Q Out of your 18,000.

A Well, we filed a joint return.

Q Mr. Appling, you understand that you were --

A We filed a joint return. That was total income of about 58,000 for the year, maybe 60,000.

Q You understand that your loss carry back resulted from the business -- **[47]**

A Correct.

Q -- that you had purchased, correct?

A Correct.

Q And that that loss carry back only went back to your tax return.

A No, it goes back to the joint return. It's a -- the return is a personal return. Business income carries back on a personal return.

Q Isn't it true that you only paid $64,000 in 2002 and that's why the maximum amount --

A No, sir, my wife paid --

Q -- you could have gotten back was 64,000 --

A No, sir.

Q -- or less?

A No, sir. My wife paid taxes, too.

Q Well, look at your amended return.

* * *

[68]

* * *

REDIRECT EXAMINATION

BY MR. WILDER:

Q Okay. I've just got a few pointed questions, and we'll move this along somewhat. Now, Mr. Appling, in March, 2005, who came up with the $100,000 figure for the tax refund?

A Mr. Strickland.

Q Okay. So, you didn't create the figure other than giving some inputs.

A No, sir.

Q Okay. Now, you said earlier -- there was some talk about you complaining about billing. Do you have Plaintiff's Exhibit 2 in front of you?

A Yes.

Q Okay. I believe you've identified this before, but there is an e-mail attached to that exhibit?

A Yes, sir.

Q In that e-mail -- do you complain about billing in any way in that e-mail?

A Yes, sir. I sure did.

Q Was that -- to the best of your knowledge, was that the first writing you complained about billing practices? **[69]**

A The first writing, yes. Yes, sir.

Q Okay. Should I take that to mean you complained over the telephone before, or is this pretty much the first time?

A Well, yeah, it was -- well, I wouldn't say it was exactly a complaint, but when I received the first bill for 50,000 for the three weeks for the work, I received a phone call from Mr. Davenport, and he asked me if I received the bill. And, of course, Lamar's letter was attached to that bill, you know, explaining why the bill was so much, that they had to pool all the resources together; you know, they had a limited amount of time; you know, kind of alluding to the fact that, you know, we did all this work, you know, we jumped through the hoops, and kind of alluding that that's why the bill was so much. And then I received a call from David Davenport and he asked me if I received a bill, and I said, Yes, I did. I said -- he said, I want to make sure you don't have sticker shock. And I said, Well, I do have sticker shock, David. And I said, I don't -- I told you, you know, how much money I had, and the -- the day I signed this contract, that I only had, like, $70,000 in credit card checks that I could obtain, and now I'm down -- you know, I've given -- I've paid out

$20,000 in retainers and now $50,000 for a bill; my money's gone.

Q When did that occur? Was that after that first billing?

A That was when the first bill hit, when I got -- received the first bill. **[70]**

Q Okay. And you got another bill for 50 grand after that, I guess?

A The next month.

* * *

[74]

* * *

BY MR. DAVENPORT:

Q Are you disputing Walter Gordon's billing statement that he reviewed the settlement agreement as signed on January 17th, 2006?

A Yes, I am. I never saw that bill.

Q And you don't --

THE COURT: That's not the question.

THE WITNESS: Yes, I -- I just --

THE COURT: The question is the -- **[75]**

THE WITNESS: I do -- I do dispute --

THE COURT: Listen, Mr. -- Mr. Appling. Mr. Appling, the question is the entry on the time bill says that the settlement agreement was reviewed on a specific date. Do you dispute that that's what happened?

THE WITNESS: Okay. I have no knowledge of that happening.

THE COURT: Okay.

MR. DAVENPORT: That's all I have, your Honor.

THE COURT: All right. Okay. Well --

MR. WILDER: Nothing further.

THE COURT: Okay. I'm going to admit D16 and D19.

(Defendant's Exhibits 16 and 19 were received in evidence)

* * *

[79]

* * *

THE COURT: Okay. I got you. All right. Now, the letter that's attached at the very end of this document, which is dated October 6th, 2005, says you're going to get a refund of $59,851 within the next two weeks.

THE WITNESS: Correct.

THE COURT: Did you, in fact, get the refund within two weeks?

THE WITNESS: Yes, sir.

THE COURT: Okay. All right. **[80]**

THE WITNESS: That's why I called a meeting.

THE COURT: All right. So, at the time of the November, 2005, meeting, you had the refund --

THE WITNESS: Yes, sir.

THE COURT: -- in hand.

THE WITNESS: Yes, sir.

THE COURT: Okay.

THE WITNESS: That's why I called the meeting.

THE COURT: All right. Did you tell Mr. Lamar at that meeting that you had received that check in that amount?

THE WITNESS: Yes, sir. He -- well, he -- he asked -- the last question he asked me --

THE COURT: Yes.

THE WITNESS: -- was did I receive the tax return.

THE COURT: Did you tell him no?

THE WITNESS: I told him I did.

THE COURT: Okay. Did you tell him --

THE WITNESS: And that it wasn't -- that it wasn't --

THE COURT: -- the amount?

THE WITNESS: That -- I told him -- well, I told him it wasn't what I expected to get.

THE COURT: Did you tell him how much it was?

THE WITNESS: I don't really recall whether I did or not.

* * *

[86]

* * *

Q And you didn't know about this -- this settlement offer was first presented at the April, 2005, meeting --

MR. DAVENPORT: Your Honor --

MR. WILDER: -- so far as you know?

THE COURT: -- same objection. We've been through this.

THE WITNESS: That's the first we heard of it.

THE COURT: Wait, wait, Ms. Appling.

MR. DAVENPORT: We've been through this. It's not relevant to what was said at the March meeting and/or the November meeting, which was --

THE COURT: How is it relevant?

MR. WILDER: Judge, it's relevant to credibility. The March --

THE COURT: Whose credibility? Whose credibility?

MR. WILDER: Well --

THE COURT: There's no question that the lawyers had one attitude about the case; it's spelled out clearly in the March, 2005, letter; Mr. Davenport had a different idea. There [87] is no question that these parties were diametrically opposed in the way that they viewed the case. Okay? Now, that doesn't speak to their credibility.

MR. WILDER: Well, what I'm trying to show is that Mr. Appling at the March, 2005, meeting had no knowledge of this other -- other way of settling his case.

THE COURT: What does that matter? The question is: Did he tell them that he had -- he expected a tax return of $100,000? Did he know that was false? At that time, did he tell them that the tax return was completed? Nothing that happened after that had an impact on what he knew at the March meeting. Okay? That's the issue in the case. What did he say and what did he know?

MR. WILDER: Well, one of the issues that's raised in the case law on these type of cases is did something change afterwards, after the hearing? Did something diametrically change?

THE COURT: No, sir. No, sir. If you lie today --

MR. WILDER: Well, I understand now.

THE COURT: -- the fact that something changes in the future does not make your lie today a truth.

MR. WILDER: Well, I understand that --

THE COURT: So, if --

MR. WILDER: -- and that's not where the case law is at. **[88]**

THE COURT: If he made a misrepresentation, if he told him, Look, I got $100,000 refund, my accountant has shown me the return, it's ready to go, it's prepared, which is what Mr. Lamar has testified, if I believe that, then your

client loses, okay, because it doesn't matter what happened after that, because at that point he has told a lie. Okay? That's -- that's -- that's false representation if he said, I got the refund, I know it's there, and the return is filed -- I mean the return is prepared. Now, he testified that the refund was just approximate and it wasn't completed yet. I've got to decide which of those I believe, okay? But what happened after that has nothing to do with what happened at that meeting.

MR. WILDER: Well, your Honor, I think they were trying to say that the promise was renewed in November in some way.

THE COURT: In November. That's right. If at the November meeting he reiterated those promises and he knew that they were untrue, then he's committed another false representation.

MR. WILDER: Well, let's talk about November. I'll talk about November with the witness, your Honor --

THE COURT: Okay.

MR. WILDER: -- if that's okay. **[89]**

BY MR. WILDER:

Q Ms. Appling, were you in attendance at the November meeting?

A I was, yes.

Q Okay. Did you make notes of that meeting?

A I did.

Q When did you make those notes?

A During the meeting and the two-hour drive home.

Q Okay. So, these were made at or near the time of the meeting?

A Yes.

Q Okay.

(Pause; voices and whispers off the record)

MR. WILDER: Do we have the original notes?

THE WITNESS: No.

MR. WILDER: Okay.

THE WITNESS: Thank you.

BY MR. WILDER:

Q I'm showing you a document that I marked as Defendant's 10. Do you recognize that document?

A I do.

Q Okay. What is it?

A This is the meeting that Scott called and made an appointment to go down in November to talk about the billing because they were not doing any work on the case at all. And **[90]** we were at a standstill; we didn't know what was going on. Scott called for a meeting, and we drove two hours to Atlanta.

Q Okay. So, this meeting was in Atlanta in Mr. Lamar's office?

A Yes, sir.

Q Okay. And you actually personally wrote out these notes?

A I did.

Q Okay. You don't have the original of them.

A No, but Scott filed all -- all kinds of files and all kinds of bills.

Q Okay.

A We came across this digging through all of the boxes and all of the bills.

Q So, are you confident that this is the -- this is an accurate copy of what you wrote?

A Absolutely.

Q Is this in your handwriting?

A It is.

MR. WILDER: Okay. Your Honor, we'd move to admit Defendant's 10.

THE COURT: Mr. Davenport?

MR. DAVENPORT: No objection, your Honor.

THE COURT: Admitted.

(Defendant's Exhibit Number 10 was received in evidence) [91]

BY MR. WILDER:

Q Okay. Do these notes, Ms. Appling, reflect the information about a tax refund?

A The tax refund was mentioned at the very end of the meeting before we left after Bob Lamar said that he would not work with us on the bill at all and

that he was not going to pursue the George Beavers case that he told us he was going to get us money back for. Right at the end of the meeting he asked Scott if he had his tax return.

Q Okay. And what was said, to the best of your knowledge?

A Scott said, Yes, I did get it.

Q Okay.

A And he said it was not anything like we thought it was going to be, like our CPA, Strickland, said it was going to be.

Q Do you remember if Mr. Lamar was told by Scott the amount of the refund?

A No. Scott did not know the amount of the refund. He called Strickland, the CPA, and said, you know, This is what's going on, I need more money, and Strickland did a calculation over the phone and told him how much it was going to be. When he got it, it was not what -- what Strickland had told us it was going to be.

Q Okay. So, in November, 2005, did Scott have the refund?

A Yes, sir.

Q And did you know how much it was? **[92]**

A Yes, I knew how much it was.

Q Did Scott tell Lamar how much it was in November, 2005?

A No.

Q Did -- what did he tell him as far as the number?

A Scott was begging Bob Lamar to continue, because he had told us that he could get us money back. And that is why we were meeting with him, to try to find out if, in fact, he was going to be able to get money back from the CPA with -- for us and when that case was going to be filed. We couldn't understand why they didn't file it already.

Q And you know what the money was used for from the tax refund?

A Yes, sir.

Q Okay. What was it used for?

A It was to support the business and to support our family. We had creditors calling already. All our credit card bills were piling up, and his business was failing.

Q Okay.

A And he made the only business decision he could make.

Q And did that keep the business afloat for a while?

A Yes, sir, it did.

MR. WILDER: Your Honor, that's all of the questions I have for this witness.

THE COURT: All right. Mr. Davenport, cross? **[93]**

CROSS EXAMINATION

BY MR. DAVENPORT:

Q So, you're -- you don't have the original of this document, correct?

A No. It was a copy that was in the files. Scott had boxes and boxes of bills, and we came across it when we were looking at all of the billing.

Q And you just found this a couple of months ago?

A It was in with all of the bills.

Q Just a couple --

A Yes, sir.

Q -- couple of months ago, correct?

A It was in with all of the bills. Yes.

Q And your testimony --

A We knew we had a meeting, but when we found these notes, then we said, Okay, this is when we went down to beg them to continue the case.

Q And when -- and, so, your testimony is that you prepared a portion of this subsequent to the meeting on the ride back to Hartwell? Is that your testimony?

A We had questions already written down that we needed to ask you and Bob Lamar, because you were in the meeting also, in the conference room. We had already written down questions, specific things that we needed to find out. So, yes, we had already written some things out. This was on the two-hour ride **[94]** home because we were in total shock of what you said, that you would not spend one more dollar -- Bob Lamar, and with you sitting there, said you would not spend one more dollar of your firm's resources on our case. And Scott and I could not believe it. We walked out of that meeting and we were totally dumbfounded. For the whole two hours home I wrote, and this is what I ended up writing.

He put it in the file. We never thought that we would be here 10 years later. And, David, you know. You told us you would get us money back. You never did that.

THE COURT: Okay. Ms. Appling. Ms. Appling, let's don't ramble. Just answer the question that's asked, okay?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. DAVENPORT:

Q And, so, just so we're clear, these were prepared on a car ride back to Hartwell by you.

A Yes, sir.

Q Now, and you are testifying that Scott, without disclosing the amount of the tax refund, told Bob Lamar that he already had the check?

A He said the tax refund has been done. Yes.

Q And --

THE COURT: That's not the question, ma'am. The question was: Did he tell him he had the check? Not whether **[95]** the refund had been done, but did he have the check?

THE WITNESS: (indiscernible)

BY MR. DAVENPORT:

Q Did Scott tell Bob Lamar and myself that he had the check in hand?

A I believe so, yeah.

Q You believe so? Or you --

A Yes, he did.

Q Okay.

A Yes, he had the check. That's why we called the meeting.

Q And what was Mr. Lamar's reaction when he heard that?

A Scott asked him first if he was going to continue the case. He told us he was going to go after George Beavers to get us money back. So, the tax return was only discussed right at the end. So, I don't understand your question.

Q The question is when -- your testimony is that Scott said that he had the tax refund and he wasn't going to pay Lamar, Archer and Cofrin.

A He did not say that.

Q Okay.

A No, sir. He did not say that.

Q What did he say?

A He said, I have to make a business decision either to keep my business afloat or go bankrupt. That's what he said. He never said he was not going to pay him. He said, I have to **[96]** make a business decision, just like you, Bob Lamar. I have to decide if I'm going to keep my business going and try to keep a roof over my family's house, my family -- that's the decision I have to make. He did not say, I'm not going to pay you.

MR. DAVENPORT: Thank you.

THE WITNESS: He said, I have to make a business decision.

MR. DAVENPORT: Thank you

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[102]

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THE COURT: All right. Let me stop you there because that seems to me to be the lynchpin of this whole case. I have -- everybody agrees that the number $100,000 was discussed at that meeting. There's no dispute about that. Mr. Gordon -- and I listened to his testimony again yesterday. Mr. Gordon did not recall that Mr. Appling said that the tax return was prepared. That is consistent with Mr. Appling's testimony, and that version of facts would be consistent with Mr. Appling's testimony that he had simply gotten some preliminary **[103]** information from Mr. Strickland. And if -- if that is the version that I accept, then there has not been a false representation at that point; because at that point Mr. Appling is doing nothing more than saying what he believes. Now, he may have been mistaken; and, obviously, he was, because the tax return -- the refund was fifty-nine; it wasn't a hundred. But Mr. Gordon's testimony seems to be in line with Mr. Appling's. And if that is the version that I accept, then I must find that Mr. Appling simply was mistaken, and that is not a false representation. That's not a fraudulent representation. To be false and fraudulent it has to be knowingly wrong. So, if the accountant had told Mr. Appling, you know, Based on this information, I think you can get $100,000, then they sit down and put pencil to paper to -- pencil to paper, it turns out different, that's a different thing than if Mr. Davenport -- excuse me --

if Mr. Appling told Mr. Lamar and Mr. Gordon, The tax return is done, I have seen it, it's going to be $100,000. Now, that's Mr. Lamar's recollection. And if that is the version that I accept, then at that point I would find that Mr. Appling had made a misrepresentation, he had fraudulently made a false representation that he knew not to be true.

What is your suggestion on how I resolve that? Because, as I tell people all of the time, most people who get on this witness stand don't have horns and pitchforks so that I can tell who the angel and who the devil is. And if this is **[104]** nothing more than a disagreement as to recollection, how am I to resolve that conflicting testimony, when you have the burden? And that's -- that's the whole key here. You have the burden. You've got the -- you know, by a preponderance of the evidence, you've got to show me that the side that you're urging is more believable than the side that Mr. Appling is arguing. So, help me out with that. Where do I look?

MR. DAVENPORT: Well, I think there are two issues confined right there. One, I believe that -- that -- or I submit that Mr. Lamar's testimony, the statement that the return had been prepared, is sufficient. But even -- but Mr. Gordon stated that there was a representation made that there would be; there would be, not just speculative; not just, I think, I hope, I wish. Mr. Gordon was emphatic that the statement was, even if he was unsure that -- that Mr. Appling used the word that it had been prepared, there was no doubt in Mr. Gordon -- in his testimony that the representation was made that there would be a tax refund of 100,000 or more.

THE COURT: Okay. And how -- but -- okay.

MR. DAVENPORT: And the second --

THE COURT: But how is that -- how is that a false representation if -- you know, I have conversations with my accountant all of the time, and, you know, I say, Well, what about this, and he says, Well, it could be this or this or that, and I report that to somebody. Now, I'm accurately **[105]** reporting what I believe. I may be wrong. But that's not a false representation. So, if Mr. Appling had called his accountant and the accountant had said, Let me ask you some questions, and Mr. Appling had given him information, and the accountant said, Well, based on that, I think you can get a hundred thousand, and then he reports that to you all, how is that fraudulent? It may be incorrect. And subsequently it proved to be incorrect. But unless you can establish that Mr. Appling, when he said it -- I think it's going to be $100,000, he knew good and well it couldn't be that or wasn't that -- in other words, I don't have Mr. Strickland's testimony that said, You know, I never told Mr. Appling that; I told him it was going to be 20 or 30 thousand dollars, maybe we'll get 60. I don't have that. So, where do I find the evidence that Mr. Appling knowingly stated a falsehood?

MR. DAVENPORT: And I have a couple of points.

THE COURT: Okay.

MR. DAVENPORT: But to go back --

THE COURT: Well, that's why I'm asking you.

MR. DAVENPORT: He did not -- he did not state what you just described. He did not say, Well, I had a conversation with Mr. Strickland. That's not what Mr. Gordon testified; that's not what Mr. Lamar did. He said, I am going to receive a tax refund in the amount of. He represented that to be true without detail. He didn't say, Well, I had a conversation with **[106]** Mr. Strickland, I called him. He didn't say the tax return hadn't been prepared. He didn't say, Well, we're speculating. He didn't say, Well, I -- I gave Strickland my income and he did a rough calculation but he's uncertain; I think; I'm going to. That's not what the testimony was between either Mr. Gordon or Mr. Lamar. It was, I am going to receive.

And I think, on that same point, and then in Mr. Lamar's letter of June 26th, on page three, he states that, and I quote, that, in -- in response to the March 9 letter:

> "In a meeting we had with Walter Gordon, you represented to our firm and the Gordon law firm that you were entitled to a refund of taxes from the IRS which would be sufficient to cover all of our outstanding and anticipated invoices, and you promised to utilize that refund when received to pay our outstanding and future invoices."

And, then, Mr. -- so, there is a -- there is a letter sent in the ordinary course of business, and under Georgia law it creates a rebuttal -- rebuttable presumption.

THE COURT: Does that apply in federal court?

MR. DAVENPORT: Um, I -- I believe that the -- that would be a substantive law that -- that would as to the evidence. We submit that it would.

And then there is a response, a written response, in July to that very letter about that meeting. And in this **[107]** letter Mr. -- Mr. Appling does not deny that statement. In fact, he doesn't even address it. What he does say is that -- then he talks about the November meeting and even acknowledges for the first time in November -- in July of 2006 that, It should be obvious what I chose to -- to do with that check.

So, we submit that for a couple of reasons, the testimony from the stand was not maybe, kind of, could have, would have, should have. It was, I am getting a refund. Mr. Lamar remembers the statement being that the return had been prepared; Mr. Gordon did not remember one way or another. And -- and I don't think their testimony is inconsistent, and I think that's sufficient alone.

The second component would be was it a reasonable -- was it a reasonable statement; was it reasonable for him to believe at the time that that was true. And we submit that the evidence is that it was not. The evidence before the Court just introduced today with the W-2 is that -- that Mr. Appling paid 64,000 and change in 2002 in taxes. The amended tax return for 2002, the only year he filed subsequent to this discussion that he states that he had with Mr. Strickland --

THE COURT: Well, let me --

MR. DAVENPORT: -- also has 64,000.

THE COURT: Let me stop you there. Let me stop you there, Mr. Davenport --

MR. DAVENPORT: Yes. [108]

THE COURT: -- because this -- this is just -- this is the real human element in a case. You know, I can state categorically that if you asked me to remember how much I paid in taxes last year or the year before or the year before, I don't -- I don't know how much it was. Okay? So, is it really reasonable to argue that someone would have in their mind the amount of taxes they had paid in the last few years? I mean, do you know how much you paid last year or three years ago?

MR. DAVENPORT: The testimony from Mr. Appling just today was that after he received the March 9 letter he then called Mr. Strickland. He then pulled out his -- his returns. That's what his testimony was; and that within a week -- I think it was actually from March 9 to March maybe 18, then this meeting occurred. And during that short period, that time window, he specifically called his CPA, Mr. Strickland; he had looked at his tax returns; and -- and provided Mr. Strickland the specific information about what he -- how much he had made and what he had paid.

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[118]

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MR. WILDER: Okay. We've got the November, 2005, notes. We do have the several pages of notes from Ms. Connie Appling that were

just introduced. And the Court's already indicated and mentioned that the testimony of Gordon and Lamar do not agree, about whether the tax return was completed or not completed in March. And there is no other evidence to support Lamar's versions of events. I asked him. Lamar said he made no notes, no inquiries, no billing indications, nothing. There is nothing anywhere close to the time from Lamar Archer or from Gordon that show that they made any such deal. There's not a letter following up that says, You just made the deal to pay me [119] your tax refund; you know, keep me -- keep me apprised of it; let me know everything about it. There's not an inquiry to the IRS; there's not an inquiry to Strickland; there's not even billing for it.

THE COURT: What -- you've made that point several times, know good and well, if you -- if a stranger writes the IRS a letter and asks something about a third party's return, they're going to get a letter back saying it's none of your business.

MR. WILDER: Well --

THE COURT: I mean, you're not getting anywhere with that, Mr. Wilder.

MR. WILDER: No. Not -- not with the IRS, but what I'm saying is nothing was done --

THE COURT: You said there was no letter from the IRS that --

MR. WILDER: There is no letter even to Mr. Appling from the firm that says, You just promised this; you know, I'm reminding you, you just promised this, so I have it in my file so I can come back to it if there's a problem.

THE COURT: All right. So --

MR. WILDER: There's not even paperwork.

THE COURT: So, are you saying that any time you have a meeting with a client you've got to write a -- a cover-your -- the-rear-end letter or be subject to saying it never **[120]** happened?

MR. WILDER: Well, I think that's why lawyers do that.

THE COURT: Well --

MR. WILDER: I mean, I'm not saying every time you have to do that, but I'm saying if you've got something important, like, This guy's 60 grand behind on his payments and we're going to get paid from the tax refund, we want to be real specific about that, especially if we're not withdrawing for this promise. I mean, I -- this would have been a letter I would have written, or at least a billing, something to show that this happened, because this was really important in the case, from what everybody's testified to.

THE COURT: Okay.

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[129]

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MR. WILDER: So, he clearly had notice of that. He had notice of Strickland's value, Porter's value, all of the different valuations of the company. He even -- we found out on March 1st, 2005, he either did something relating to calling a bankruptcy attorney for Mr. Appling about his personal issues.

So, he knew -- I mean, he knew to be skeptical. I mean, he just threw that out the window and --

THE COURT: No.

MR. WILDER: -- relied on his client.

THE COURT: No, the question is -- the question is: Was it proper for him to rely on the representation that Mr. Appling made, which was, The return is done, it is ready to be filed, and I'm going to get over $100,000, and I will use that to pay my legal fees.

MR. WILDER: Okay. Well, let --

THE COURT: Well, why would -- knowing the company is in financial distress, why would that automatically make me think my client's a liar? That's what you're arguing to me, that he should have been no notice that Mr. Appling was telling him a falsehood.

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